Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1998

RICHARD D. SLAUTTERBACK, SANDRA L. SLAUTTERBACK, TRUSTEE, AMERICAN OWNER OPERATOR UNDERWRITERS, INC. and AMERICAN TRUCK UNDERWRITERS HOLDING CORPORATION,
Petitioners,

vs.

IPC MUTUAL INDEMNITY, LIMITED,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court may hold that the statute of limitations for fraud claims continues to run where two of three parties to a fiduciary relationship not only concealed their secret termination of one of three tripartite agreements binding the three parties, and where those same two parties conspired to and did falsely report to the Petitioner to conceal their fraud..

2. Whether the federal court should have applied the statute governing mutual accounts, that is, that the statute of limitations for mutual accounts begins to run on the date of the last item thereto, rather than beginning at the time of the discovery of the alleged fraud.

3. Whether the federal court should have applied the ten-year statute of frauds governing causes of action against fiduciaries.

4. Whether a federal court should litigate the three contracts of an interlocking tripartite rent-a-captive arrangement in one civil action, such that the true relationship among the parties can be adjudged, considering the effect of the terms of the related agreements, and where the rent-a-captive relationship is a creature of Bermuda law, and with one of the three contracting parties a Bermuda incorporated captive insurance company.

5. Whether this Court should review this case of first impression in regard to alternative to reinsurance programs which are implemented through offshore rent-a-captives now constituting 50% of all premium dollars of United States insureds. There is no American case law governing this huge multibillion dollar business, nor case law dealing with such tripartite arrangements.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following subsidiary or sister corporations were parties before the Court of Appeals:

330 Mad. Parent Corp.
AIC Financial Corp.
Allcity Insurance Co.
American Life & Casualty Insurance Co.
American Life Holding Co.
American Travelers Insurance Company of N.Y.
American Truck Underwriters, Inc.
American Investment Co.
American Life Holdings, Inc.
American Investment Financial
American Life & Casualty Marketing Division Co.
American Investment Bank, N.A.
American Travelers Life Insurance Co.
Balwin Forest Products, L.L.C.
Baldwin Enterprises, Inc.
Baldwin-CIS, L.L.C.
Bankers Life & Casualty
Bankers National Life Insurance Co.
Bankers Life Insurance Company of Illinois
Bankers Life & Casualty Co.
Bay Colony Insurance Co.
Bayside Casualty Insurance Co.
Bellpet, Inc.
Beneficial Standard Life Insurance Co.
Caja De Aharro y Seguro S.A.
Capital Management, Inc.
Centurion Insurance Co.
Certified Life Insurance Co.
Certified Life Insurance

CFM Insurance Managers (Bermuda)
Charter National Life Ins. Co.
CIHC, Inc.
CIHC Entertainment Nevada, Inc.
CNC Real Estate, Inc.
College Life Development Corp.
Colonial Penn Group, Inc.
Colonial Penn Insurance Company
Colonial Penn Franklin Insurance Company
Commercial Loan Insurance Corp.
Commonwealth Risk Services (Europe) Limited (United Kingdom)
Commonwealth Risk Services, Inc. (Pennsylvania)
Commonwealth Risk Services (West) Ltd. (California)
Conseco Risk Management, Inc.
Conseco Entertainment, L.L.C.
Conseco Financial Services, Inc.
Conseco Services, L.L.C.
Conseco Entertainment, Inc.
Conseco Equity Sales, Inc.
Conseco Global Investments, Inc.
Conseco Marketing, L.L.C.
Conseco Mortgage Capital, Inc.
Conseco, Inc.
Conseco Private Capital Group, Inc.
Continental Life Insurance Co.
Conwed Corp.
CPAX, Inc.
CPI Investments, Inc.
Empire Insurance Group
Empire Insurance Co.
Florida Power & Light Company
FPL Group, Inc.
Great American Reserve Insurance Co.
Hamilton Management Ltd. (Wisconsin)

HJF International (Bermuda)
HSD Venture
Intrameria Life Insurance Co.
IPC Group of America, Ltd. (Pennsylvania)
IPC Mutual Holdings Ltd. (Delaware)
Jefferson National Life Insurance Company of Texas
Lamar Life Insurance Co.
Legion Management Corporation (Oklahoma)
Legion Finance Corporation (Missouri)
Legion Insurance Company (Pennsylvania)
Leucadia National Corporation
Life Partners Group, Inc.
Lincoln American Life Insurance Co.
Lincoln Income Life Insurance
LNC Investments, Inc.
Lomas Financial Corp.
M & A Holdings, Ltd. (Bermuda)
Marketing Distributions Systems Consulting Group, Inc.
Massachusetts General Life Insurance Co.
MRM Reinsurance Brokers (Bermuda)
MRM (Vermont) Ltd. (Vermont)
Mutual Risk Management (Bermuda) Ltd.
Mutual Indemnity (Dublin) Ltd.
Mutual Indemnity Ltd. (Bermuda)
Mutual Indemnity (Barbados) Ltd. (Barbados)
Mutual Risk Management (Cayman), Ltd. (Cayman)
Mutual Risk Management Ltd.
Mutual Risk Management (Barbados) Ltd. (Barbados)
Mutual Finance, Ltd. (Bermuda)
Mutual Group, Ltd. (Delaware)
Mutual Indemnity (Bermuda) Ltd. (Bermuda)
National Fidelity Life Insurance Co.
Neward Corp.
MASC, Inc.
Park International Limited (Bermuda)

Pennpark Investors, L.L.C.
Philadelphia Life Insurance Co.
Philcorp, Inc.
Premium Securities Limited (Bermuda)
Professional Data Management, Inc.
Rastin Investing Corp.
Rerco, Inc.
Shoreline Mutual Management (Bermuda) Limited (Bermuda)
Silver Mountain Industries, Inc.
Solana Corp.
Sperry & Hutchinson Co., Inc.
Telluride Properties Acquisition, Inc.
Terreacor II
TLIC Life Insurance Co.
Transatlanta Truck Insurance Underwriters, Inc.
Transport Life Insurance Co.
Transportation Capital Corp.
Truck Office of America
Truck Underwriters of America, Inc.
United General Life Insurance Co.
Village of Inlet Beach, Inc.
Vulcan Life Insurance Co.
Wabash Life Insurance Co.
Wedgewood Investments, L.L.C.
Wells & Company, Inc.
Wellsco, Inc.
WMAC Investment Corp.
WMAC Credit Insurance Corp.

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Petitioners, Richard D. Slautterback, Sandra L. Slautterback, Trustee, American Owner Operator Underwriters, Inc., and American Truck Underwriters Holding Corporation ("the Slautterbacks"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is a non-published affirmance of the District Court decision pursuant to 11th Cir. R. 36-1. (App. A) The opinion of the District Court in *Slautterback, et al. v. IPC Mutual Indemnity Limited* (N.D. Ga., December 13, 1996) is not published. (App. C)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on December 1, 1997. The Court of Appeals denied a timely petition for rehearing on July 23, 1998. (App. B)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .." If one party is barred or deterred from bringing an action by the fraud of the other party, the statute of limitations begins to run only from the time of the discovery of the fraud. O.C.G.A. § 9-3-96.

The Shareholder's Agreement which is the contract for breach of which Petitioners have filed the underlying suit, is the

product of Bermuda law, the Insurance Act of 1978 (Act No. 39 of 1978), July 7, 1978, Bermuda. That act provides that the captive facility, i.e., the Respondent, "rents" its capital, surplus, and license to the policy holder, i.e., the Petitioner, and the rent-a-captive (Mutual) provides administrative services (escrow and mutual accounts). The agreement itself, i.e., the Shareholder's Agreement, defines the relationship of the parties providing that the Respondent is the administrator or escrow agent to merely receive the premiums generated by the Petitioner, and accounts for them as fiduciary and escrow agent for the benefit of the Petitioner/ Shareholder who rented the Captive, i.e., Mutual, the Respondent. As such, the mutual accounts statute of limitations was the proper statute of limitations to apply, and not the fraud or contract statute of limitations. Bermuda law, defining the nature of a rent-a-captive, and the shareholders agreement, made under Bermuda law, governs the nature of the relationship of the parties, i.e., as a fiduciary relationship running from Respondent to Petitioner; and it is Georgia law, respecting the appropriate statute of limitations, i.e., the mutual accounts statute, that applies mandating the use of the ten-year statute of limitations respecting fiduciaries as the proper statute to apply in this case.

STATEMENT OF THE CASE

A fundamental question in this case is whether the statute of limitations in a contract case is tolled during the active fraud of two party fiduciaries against a third party to a tripartite "rent-a-captive" insurance venture. Secondly, should another statute of limitations have been considered. Thirdly, should the three contracts have been considered together which comprise the tripartite arrangement known as alternative to reinsurance, i.e., self-insurance as opposed to reinsurance.

I. Background of the Rent-a-Captive Alternative to Reinsurance Arrangement.

Creative entrepreneurs have found a way to allow the managing general agency, i.e., the generator of insurance sales and premiums, to obtain the underwriting profits, i.e., premiums less losses paid. A statutory requirement to receiving underwriting profit, or acting as an insurance company, is reinsurance or some alternative to reinsurance. Under Bermuda law rent-a-captives provide for the alternative. Through Bermuda law (no state in the U.S. has to date passed enabling legislation authorizing rent-a-captives) an MGA could rent a captive insurance company through the medium of the purchase of non-voting preferred stock in a Bermuda corporation that for a fee would act as an escrow agent for premium dollars and administer the program of insurance by taking the premium dollars ceded to it by the MGA and invest those premiums, pay over sufficient premium dollars to the MGA for the payment of claims; and, at designated times, pay to the MGA all premiums in excess of claims paid plus investment income as a preferred share dividend after deducting its fee. The rent-a-captive would take no risk, and so it has declared in SEC filings, in its New York Stock Exchange Prospectus and in all World Wide Web Sites and other sales literature. Respondent's Bermuda counsel, Appleby, Spurling & Kempe, have published a guide, AS&K GUIDE, regarding special types of insurance vehicles, including a description of rent-a-captives, which states unequivocally that rent-a-captives take no risk and act as mere conduits of underwriting profits and investment income for organizations like the Petitioners. (Appendix D) The *Self-Insurance Manual*, NILS Publishing Company, 1988, (Appendix H) states in Section 12.3.3.1 that rent-a-captives act as administrators only in alternative risk arrangements, including the use of a fronting company such as Colonial Penn.

In order to sell and issue policies in the U.S., the MGA contracted with a licensed insurer qualified in all states in the U.S. under an agreement that the licensed insurer would act merely as a fronting company, i.e., license the use of its name on policies of insurance for a fee. The various states sanctioned the practice as long as the fronting company assumed a minimum of 10% of the risk, which Colonial Penn Insurance Co. agreed to do.

Thus, the Petitioners purchased preferred stock in the Respondent (Appendix E), the rent-a-captive, and through the latter's administration of the program Petitioners acted as the reinsurer, because the Reinsurance Treaty provided that the consideration for the reinsurance was 90% of the premiums to be paid to the named reinsurer, i.e., Mutual, however, via the Shareholder's Agreement Mutual agreed to pay this 90% of the premiums ceded to the Petitioners after claims paid.

The Agency Agreement (Appendix F) entered into between the Petitioners and the fronting company, i.e., Colonial Penn, provided that the Petitioners, as attorneys in fact, would place the reinsurance, which it did through the reinsurance treaty signed by the rent-a-captive rented by Petitioner. The reinsurance treaty (Appendix G) provides that it was entered into for the consideration that 90% of the premium be paid to the reinsurer, which, although listed as the Respondent, the Respondent, via the Shareholder's Agreement, committed to pay all those premium dollars over to the Petitioners.

That is why all three contracts must be read together. Otherwise, its like the parable of the blind men and the elephant. One feels the trunk and thinks it a snake. Another feels the leg and thinks it a tree. If the agency agreement is read independently, Colonial Penn may seem to be the insurer, rather than the fronting company, at risk for only 10% of the premium and receiving only a fronting fee. If read

independently, the reinsurance treaty might seem to be between an insurer and a traditional reinsurer, whereas, Mutual Indemnity, Respondent, takes no risk and receives no premium as consideration (as a traditional reinsurer must) according to Bermuda law governing rent-a-captives, according to the Mutual Indemnity's SEC filings such as 10K and 10Q, according to its prospectus on Wall Street to all its investors as a publicly held company, according to all its sales literature, and according to the Shareholder's Agreement it entered with Petitioners, which spells out in detail that Respondent is acting as a mere administrator of the program premiums, or escrow agent, receiving premium, paying over to Petitioners sufficient premium dollars to pay claims as periodically demanded by Petitioners, and finally paying over to Petitioners alone all underwriting profits, i.e., all premiums less claims paid plus investment income as a preferred share dividend as ownership or rent for the rent-a-captive. Thus the ostensible reinsurer, because it is "rented" by Petitioners under Bermuda law, signed the reinsurance treaty on behalf of Petitioners, who are the real reinsurer; or, to put it another way, the Petitioners were self-insured, by means of this device, sanctioned by Bermuda and the various states laws so long as a fronting company is used and the fronting company takes a minimum of 10% of the risk.

Mutual has grown into a giant since this transaction, now showing several billions in assets. Mutual has the following World Wide Web addresses: www.comrisk.com; www.mutrisk. com; www.producersforum.com; and www.accessmrm.com, explaining the nature of a rent-a-captive and Mutual.

Therefore, although at first blush from reading the Reinsurance Treaty it appears that the rent-a-captive or Mutual, i.e., the Respondent, is a traditional reinsurer contracting with an insurer, i.e., Colonial Penn, in a traditional reinsurance arrangement, further reference to the Shareholder's Agreement

makes it clear that the arrangement is really a Bermuda rent-a-captive, or alternative to reinsurance arrangement, because the Shareholder's Agreement provides that 90% of premium dollars is paid over to the Petitioners, and none retained by Respondent, who merely receives a fee for acting as a fiduciary in administering the money that merely passes through its hands, i.e., the Respondent merely acts as an escrow agent and as a fiduciary for the benefit of the Petitioners, and the Petitioners, in effect, are self-insured, which is the objective of the Bermuda rent-a-captive arrangement. Industry statistics show that 50% of all U.S. premium dollars are now placed in rent-a-captive arrangements of this kind, i.e., alternative to traditional reinsurance arrangements, i.e., in fact no reinsurance, but, rather, a mechanism for self-insurance.

II. The Tripartite Venture.

In 1985, Slautterback (Insured/shareholder), Mutual Indemnity (Rent-a-Captive) and Colonial Penn (Fronting Company) entered into a tripartite, alternative risk management plan, through the execution of three contracts: (1) The Shareholder Agreement between Slautterback and Mutual Indemnity dated August 1, 1985, which is the subject of this suit, a Quota Share Treaty (or reinsurance agreement) between Colonial Penn and Mutual Indemnity, and an Agent Agreement between Slautterback and Colonial Penn.

The relationship of the parties was expressed in three basic contracts, all interrelated, and no one of which would have been entered into by any of the parties but for the existence of the others. In other words, each of the parties to contract "A" was aware of the necessity for the other two contracts, "B" and "C" which needed to be signed before that party would agree to be bound under contract "A." The arrangement was called a "tripartite" contract. The three contracts were 1) an agency agreement; 2) a share-holders'

agreement; and 3) a reinsurance treaty.

Pursuant to the Shareholder Agreement, Slautterback purchased 432,000 non-voting preferred shares of Mutual Indemnity, by posting a $432,000 letter of credit. Insurance premiums were then collected by Slautterback from the policyholders, and Slautterback then issued the policies of insurance using Colonial Penn's name, and then remitted premiums to Colonial Penn under the Agency Agreement. Colonial Penn deducted its fronting fee, and forwarded the remainder of the premiums to Mutual Indemnity as required by the Quota Share Treaty. Mutual Indemnity was to deduct its rental fee (rent-a-captive), then hold the balance of the premiums for the benefit of Slautterback, investing the premiums, paying premium dollars to Slautterback as demanded through reports of claims generated by Slautterback as claims manager, and finally, to return to Slautterback all premiums remaining as underwriting profits (premiums less claims paid under the program of insurance) plus investment income during the holding period. Mutual Indemnity was then to redeem the preferred stock on January 1, 1991.

During the existence of the tripartite arrangement, Mutual Indemnity sent Slautterback annual financial statements regarding "[its] preferred shares Series V4" in 1986, 1987 and 1988, showing investment income and the stock's current value. In 1989 and 1990, two of the three parties, i.e., Slautterback and Colonial Penn, were in litigation over the venture, and on January 1, 1991, when Mutual Indemnity failed to fulfill the scheduled stock redemption and to pay the funds over to the Slautterbacks, a letter was written to the Bermuda Monetary Authority concerning the stock. Slautterback learned from the Authority that the shares had been canceled in 1987. He also learned late in the litigation with Colonial Penn that in December, 1987, Mutual Indemnity and Colonial Penn had entered into a secret rescission of their Quota Share

Reinsurance Treaty, including a provision that Colonial Penn would indemnify, defend and hold harmless Mutual Indemnity from any liability it might incur with the Slautterbacks for wrongful termination of the rent-a-captive Shareholders Agreement. Thus, prior to that secret agreement, Mutual Indemnity had somehow secretly, unilaterally and illegally redeemed the Slautterback stock. This secret agreement was actively and purposefully concealed from Slautterback until March, 1989, when it was finally produced in discovery in the litigation between Slautterback and Colonial Penn.

In the first law suit, Slautterback was sued by Colonial Penn, the mere fronting company, which misrepresented to Judge Tidwell that they were the 100% insurer rather than a fronting company, and they sued on only one of the three interrelated or tripartite agreements, and they denied that Mutual Indemnity was an indispensable party, although the latter was one of three parties tied together by the tripartite arrangement, and they alleged that Mutual Indemnity sold Colonial reinsurance, although Mutual Indemnity has declared to the world that they take no risk (find a reinsurer that doesn't take risk and you have a strange anomaly), and on appeal they said that Slautterback was no party to any thing and due nothing, in spite of the Shareholders Agreement that says that Slautterback gets it all as follows:

1) Slautterback was the party to get 100% of the consideration for the reinsurance as stated in the Quota Share Reinsurance Treaty by virtue of the fact that Mutual Indemnity, to whom 100% of the consideration set forth in that reinsurance agreement goes, but its must be understood that Mutual Indemnity had by virtue of the Shareholders Agreement then turned that entire amount over to Slautterback. This is consistent with the nature of a rent-a-captive. A rent-a-captive rents its status as a captive to the renter, i.e., in this case Slautterback, and merely administers the premiums for the

benefit of the renter, i.e., in this case Slautterback.

2) Slautterback was to receive the entire underwriting profits on 90% of the premiums (all premiums less claims paid) plus all of the investment income on the premiums administered, less Mutual Indemnity's fee of 2 ½ %, according to the Shareholder Agreement.

The result is that in the first case the court looked at only one contract, the agency agreement. In the second case, before Judge Julie Carnes, the Petitioners sued Mutual Indemnity, who had been effectively excluded as an indispensable party by the urgings of Colonial Penn and its lawyer, Paul Burke. In the second case, Mutual Indemnity's lawyer, Paul Burke, argued that Slautterback was not a party to the reinsurance agreement and had no standing to bring the suit. But how could Mutual Indemnity be the reinsurer when it declares to the world that it does not take risk? If the trial court does look at the other contracts that constitute the tripartite contract arrangement, it will see that one of the three contracts sets forth that the consideration for the reinsurance, or 90% of the premiums ceded, was required passed through to Slautterback, making Slautterback effectively self-insured, especially when it is written in the Shareholder Agreement that the extent of reinsurance is 70% of premiums ceded, i.e, 70% of the 90% maximum, i.e., self-insurance in its classic form. This court may actually be able to see the whole picture and not a third as the other District Court was limited because of the misrepresentations of Colonial and Paul Burke, and the truth be finally known.

III. The Federal Proceedings Below.

On March 31, 1987, Colonial Penn sued Slautterback in U. S. District Court, Northern District of Georgia, Atlanta Division, alleging violations of the Agency Agreement. *Colonial Penn v. Slautterback, et al.*, 36 F.3d 95 (11th Circuit

1994 per curiam) Slautterback sought to add Mutual Indemnity as a party to the Colonial Penn lawsuit, over Colonial Penn's objections through counsel, Paul Burke. The District Court denied the motion for joinder on July 20, 1987, and in its final judgment and Order of September 29, 1993, the Court stated that ". . . since MI is not a party to this litigation, this decision does not purport to affect any rights Slautterback may have against MI."

Slautterback filed this action against Mutual Indemnity in the District Court for the Northern District of Georgia, Atlanta Division, on December 22, 1994, less than four years after the January 1, 1991, date that Mutual Indemnity was required by the Shareholders Agreement to redeem the preferred shares. Slautterback alleged breach of contract and fraud among its claims. Mutual Indemnity invoked its indemnity clause under the secret rescission contract with Colonial Penn, and Paul Burke now appeared to defend Mutual Indemnity, Respondent. Mr. Burke filed a Rule 11 against Slautterback's counsel protesting that this suit was frivolous in light of the findings in the Colonial Penn suit, although he was privy to the proceedings in the Colonial Penn suit and the court's order that ". . . since MI is not a party to this litigation, this decision does not purport to affect any rights Slautterback may have against MI." This threat of a Rule 11 intimidated Slautterbacks' counsel who, without informing the Slautterbacks, traded a legitimate motion for contempt against Mutual in consideration for dismissal of the Rule 11.

Following discovery, Mutual Indemnity filed various motions, including a motion for summary judgment based upon expiration of the statute of limitations. It is in this motion that Mutual Indemnity, through Paul Burke under the indemnity agreement, pleads falsely that Colonial Penn was a 100% insurer rather than the 10% fronting company and that Mutual Indemnity sold reinsurance to Colonial Penn rather than a

Mutual Indemnity's true role as a rent-a-captive and mere administrator of premium funds for the benefit of Slautterback as supported by the Shareholder Agreement (Appendix E) and the AS&K Guide of their own counsel, Appleby, Spurling & Kempe (Appendix D).

The District Court granted summary judgment in favor of Mutual Indemnity on December, 13, 1996, on the grounds that the claims were barred by statutes of limitations. An appeal was taken to the 11th Circuit which affirmed the District Court *per curiam* without opinion on December 1, 1997. (132 F.3d 47 (1997)). Rehearing was denied on July 23, 1998. It is from this decision that application for a Writ of Certiorari is made.

REASONS FOR GRANTING THE WRIT

I. Active Fraud and Fraudulent Concealment by a Fiduciary Tolls the Running of the Limitations Period - Resolution of the Split Among the Circuits

In *Klehr v. A. O. Smith Corp.*, Case No. 96-633 (June 1997) this Court declined to resolve the split in the various circuits as to what facts either start or stop the running of the statute of limitations, stating that the Court preferred to ". . . wait for a case that clearly presents these or related issues, providing an opportunity for full argument. . . ," before it attempted to resolve them. The facts and issues in the case below provide just that opportunity.

A. *Fiduciary Relationship*

The relationship of the parties of a tripartite rent-a-captive insurance venture are similar in nature to the tripartite suretyship between a surety, principal and creditor. *A. H. Kellos Construction Co. v. Balboa Insurance*, 495 F.Supp. 406 (S.D. Ga. 1980) concerned suit on a construction performance

bond. Although that case was dismissed for failure to state a claim for negligence against the supplier of roofing material where damages were economic, it presents suretyship as a good analogy to the fiduciary relationship between a corporation and its shareholder, and between an insurance reinsurer and the insured.

A second example is that which existed in *Lehman v. Zuckerman*, 198 Ga.App. 202, 400 S.E.2d 704 (1990), where a builder and an investor formed a construction company for the purpose of building houses. The investor put his own money into the company which the builder managed. When the company was dissolved, the builder agreed in writing to repay the investor for his financial contributions. When the builder did not pay, the investor sued. The builder claimed at trial that the investor's claims for reimbursement and the procuring of the agreement were fraudulent. The Georgia Court of Appeals held that "a special relationship of trust or confidence exists between partners, who owe a duty of 'utmost good faith' to each other. [Cit.] Because of that confidential relationship, one partner is entitled to rely on representations made by another partner." *Allen v. Sanders*, 176 Ga.App. 647 (1) (337 S.E.2d 428) (1985). There was sufficient evidence for the Court to find the existence of a confidential relationship. Zuckerman and appellant were equal partners in the construction company, each providing his own experience toward a common business objective. See *Vitner v. Funk*, 182 Ga.App. 39 (2) (354 S.E.2d 666) (1987). *Lehman*, 198 Ga.App. At 431.

In our facts, Slautterback acted as the "investor" - its funds (premiums) were sent to Colonial Penn, the "Builder," who deposited them into Mutual Indemnity, the "Construction Company." All three entities provided their own expertise towards the common business objective of making money from insurance policies. This clearly establishes the fiduciary/ confidential relationships as they related to the joint venture

itself. Mutual Indemnity is also a fiduciary with respect to its relationship to its stockholder, Slautterback. Mutual Indemnity held Slautterback's money with the duty to invest and eventually return it to the Shareholder. Slautterback held shares of stock in Mutual Indemnity as its "collateral" or security for the return of the money, although the actual physical stock shares apparently never left Bermuda. Thus, by holding both the money and the physical shares of stock themselves in Bermuda, Mutual Indemnity was in a position to exert an overwhelming influence over Slautterback's interests. Under Official Code of Georgia Annotated (O.C.G.A.) § 23-2-58, "[a]ny relationship shall be deemed confidential, whether arising from the nature, created by law, or resulting from contract, where one party is so situated as to exercise a controlling influence over the will, conduct and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." All that the law requires is the showing of a relationship in fact which justifies the reposing of confidence in one party by another. As provided in O.C.G.A § 23-2-53: "Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." "[O.C.G.A § 23-2-53] expressly goes beyond the strict fiduciary relations of the parties and states that the obligation to communicate may arise 'from the particular circumstances of the case.'" *Remediation Services, Inc. v. Georgia Pacific Corporation*, 209 Ga.App. 427, 433 S.E.2d 631 (1993).

B. Fraudulent Concealment

Although the District Court found that the breach of contract occurred in December, 1987, with the execution of a secret rescission agreement between Colonial Penn and Mutual

Indemnity, the existence of this rescission agreement was unknown by and concealed from Slautterback by Colonial Penn and Mutual Indemnity until March of 1989, when the rescission agreement was finally produced during discovery. Not only did Colonial Penn and Mutual Indemnity actively conceal the existence of the rescission agreement from Slautterback, but Mutual Indemnity further perpetuated the fraud by continuing to send false and fraudulent annual financial statements to Slautterback showing the stock's value in 1987 as well as in 1988, a year after the secret rescission was executed. These active acts of concealment of the fraud were intended to and did in fact cause Slautterback to ". . . remain in ignorance of it without any fault or want of diligence or care on his part." Therefore, the ". . .bar of the statute does not begin to run until the fraud is discovered." *Holmbers v. Armbrecht*, 327 U.S. 392 (1946). See also *McClure v. Raper*, 266 Ga. 60, 463 S.E.2d 125 (1995).

C. "Injury and Concealment" versus "Separate and Independent Injury"

The 8th, 10th and 11th Circuits have adopted the "injury and pattern discovery rule" as described in *Bivens Gardens Office Building v. Barnett Bank*, 906 F.2d 1546, 1554-1555 (11th Cir. (1990)), while others apply forms of an "injury discovery rule, and finally, the 3rd Circuit uses a "last predicate act" rule in deciding whether the statute of limitations has run on a RICO claim. In *Klehr v. A.O. Smith Corp.*, U.S. Supreme Court Case No. 96-633 (Decided June 19, 1997), the court considered the case of a farm silo which produced moldy and fermented cattle feed, despite false representations by the seller that the silo would prevent such damages. The plaintiff sued, claiming a civil RICO cause of action. The defendant interposed a statute of limitations defense, and the district court dismissed the claims. The Supreme Court affirmed, holding that when the plaintiff did not exercise due diligence to

discover the fraud, the defendant's acts of fraudulent concealment do not toll the statute from running. This is in contrast to Slautterback, where there was due diligence and the active concealment of the fraud of Mutual Indemnity.

In the case at bar, the question also arises as to when the final, separate injury occurred, which would mark the beginning of the running of the statute of limitations. *Bivens Gardens Office Building*, supra at 1556, and *Pilkington v. United Airlines*, Circuit Case No. 96-2539 (11th Cir. 1997). Although the district court found that our contract was breached at the time of the wrongful Shareholder's Agreement rescission in 1987 (which fact was concealed from Slautterback until 1989), Mutual Indemnity did not have a legal duty to redeem the shares of preferred stock until January 1, 1991. It was this failure to perform that legal duty which was the independent act which inflicted a new independent injury upon Slautterback, and thus the beginning of a new four year statute of limitations period, which had not yet run when suit was filed on December 13, 1994.

D. Actual Cause of Action

In Georgia, allegations of fraud must be "stated with particularity." O.C.G.A. § 9-11-9(b) in order to have a valid cause of action. Unless and until Slautterback could state the "circumstances constituting fraud with particularity," any suit for fraud would have been dismissed by the Court. *McLean v. Haden*, 214 Ga.App. 413, 448 S.E.2d 69 (1994). Under the District Court's analogy of the statute having commenced prior to Slautterback being able to plead the facts, this would have left Slautterback without a remedy. The District Court found as fact that Mutual Indemnity concealed the existence of the rescission agreement from Slautterback until March, 1989, at the earliest. Since Slautterback could not have known the facts which constituted fraud, suit could not have been filed.

O.C.G.A. § 9-3-96. A similar situation occurred in *Fincit Company II v. Hardin*, 225 Ga.App. 2323, 483 S.E.2d 609 (1997), where the court considered a claim for damages and fraud in real estate partnerships. The Georgia Court of Appeals held that genuine issues of material fact remained as to when the fraud was discovered and whether the defendant's alleged misrepresentation and concealment of the full extent of the fraud prevented the plaintiff from discovering it. In our case, the active concealment by Mutual Indemnity and Colonial Penn of the facts concerning the rescission, the redemption of the shares and the false financial statements, prevented Slautterback from being able to allege the fraud, and thus the statute must be tolled. *Adler v. Hertling*, 215 Ga.App. 769, 451 S.E.2d 91 (1994).

The requirement of having concrete facts to point to the cause of an injury before starting the limitations bar from running was also pointed out by the 11th Circuit Court of Appeals in *White v. Mercury Marine*, 129 F3d 1428 (11th Cir. 1997). In *White*, that Court was interpreting the general maritime statute of limitations and again, deciding whether the "continuing tort," "modified continuing tort," or "discovery" theory should be applied to determine when the cause of action "accrued." After analyzing each of the competing theories and law from other circuits as well as this one, this Court held that the cause of action accrues "when the Plaintiff knew or should have known of his injury *and its cause*." [emphasis supplied] The plaintiff in that case was found to have waited too long to file suit after knowing of his injury (hearing loss) and its cause (engine noise), but not filing suit until the damages had increased.

The evidence in our case shows that although Slautterback might have suspected fraud, Mutual Indemnity took significant steps to prevent him from discovering the facts to support the claim, until they were finally disclosed in March,

1989. Thus, the statute of limitations had not yet run on Slautterback's causes of action when it filed suit in December, 1994.

II. The Petition should be Granted because the Court below Failed to Apply the Mutual Accounts Statute of Limitations to this Case

A. The District Court erred in granting summary judgment for the Respondent on the ground of expiration of the statute of limitations.

A federal court in a diversity case must apply the substantive law of the state which encompasses its district, *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), including the conflict of laws rules of the forum state, *Klaxon Co. V. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). The federal court seeks to discern how the Supreme Court of the forum state would decide the issues involved. *Klewit Eastern Co. v. L & R Constr. Co.*, 44 F.3d 1194, 1201 n.16 (3d Cir. 1995). When the forum state's Supreme Court has not addressed an issue, the federal court may look to decisions of the intermediate courts for guidance. Id.; *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 614 (3d Cir. 1992).

In Georgia, statutes of limitation are remedial and procedural rather than substantive, *Thomas v. Clarkson*, 1125 Ga. 72, 54 S.E. 77 (1906), so Georgia courts apply Georgia limitations rules even when the substantive law of another jurisdiction controls. *Indon Industries, Inc. v. Charles S. Martin Distributing Company, Inc.*, 234 Ga. 845, 218 S.E.2d 562 (1975), *Lloyd v. Prudential Secs., Inc.*, 211 Ga.App. 247, 438 S.E.2d 703 (1993), *Fimian v. Guy F. Atkinson Co*, 209 Ga. 113, 70 S.E.2d 762 (1952); *Cash v. Armco Steel Corporation*,

462 F.Supp. 272 (N.D. Ga., 1978).

Georgia's limitations of actions are codified in Title 9, Chapter 3 of the Official Code of Georgia, with all limitations periods and tolling provisions meshing as gears of a single machine, integral parts of a unified whole. Therefore, while the contract clause selecting Bermuda law would be upheld as to substantive issues in Georgia, *Carr v. Kupfer*, 250 Ga. 106, 296 S.E.2d 560 (1982), Georgia tolling rules would apply because a tolling rule is an integral part of a statute of limitations. See, e.g., *Vaught v. Showa Denko K.K.*, 1997 U.S.App. LEXIS 12786 (5th Cir., 1997).

B. The District Court should have found that the Shareholder Agreement gave rise to a mutual account, as to which under Georgia law the limitation period does not begin to run until the date of the last item thereof.

The limitation period should be calculated from the date that the Shareholder Agreement provided for the final stock redemption, or January 1, 1991. O.C.G.A. § 9-3-7 provides that "the statute of limitations for a mutual account begins to run on the date of the last item thereof.

A mutual account must include an indebtedness on both sides. Mere entries of credits of partial payment shall not be sufficient." In cases of mutual accounts, the statute of limitations begins to run from the date of the last item embraced within mutual dealings. *Turner v. Davidson*, 188 Ga. 736, 4 S.E.2d 814 (1939).

This statute, if applied, would start the limitations period running from January 1, 1991. The District Court's Order, however, did not address the effect of this statute.

Under Georgia law it is a jury question as to whether or not an account is mutual. *Turner v. Davidson*, 188 Ga. 736, 4

S.E.2d 814 (1939). Georgia law presumes that mutual accounts, once established, run through all the course of dealings of the parties. See, e.g., *Gunn v. Gunn*, 74 Ga. 555 (1985).

In this case, there were mutual accounts between Slautterback and Mutual Indemnity. Slautterback gave Mutual Indemnity a letter of credit for US $432,000, and Mutual Indemnity in Bermuda issued to Slautterback 432,000 shares of non-voting preferred shares of stock in Mutual Indemnity. The contract provided that Mutual Indemnity would redeem the 432,000 shares on January 1, 1991, with the redemption payment adjusted to account for investment income earned and claims experience in the transaction. Mutual Indemnity, during the life of the account, would pay to Slautterback amounts necessary to pay claims. The letter of credit and shares would remain outstanding and in existence until January 1, 1991.

Slautterback in turn, was obligated on the account to pay Mutual Indemnity up to 70% of the premiums deposited in that account for potential reinsurance claims for 90% of premiums deposited. Slautterback was obligated to pay Mutual Indemnity the latter's fee of 2.5% for administration of the account, plus other lesser fees for Mutual Indemnity's investing the premium dollars in the account.

Thus, the requirements of the Mutual Accounts statute were met, i.e., that "A mutual account must include an indebtedness on both sides." Therefore, because the running of the statute of limitations was tolled pursuant to O.C.G.A. § 9-3-7, the limitation period in this case should be calculated to run from January 1, 1991. The six year limitation period for written contracts as we have here would thus expire January 1, 1998. The four year limitations period for tort claims would expire on January 1, 1996, over a year after the case at bar was filed. If the ten year limitation period for claims against

fiduciaries, as we clearly have here as an administrator, escrow agent for the account and corporation owes to its shareholder, O.C.G.A. § 9-3-27 applies, and it would expire January 1, 2002.

Under Georgia law, corporate officers and directors occupy a fiduciary relationship to the corporation and its shareholders, and are held to the standard of utmost good faith and loyalty. *King Mfg. Co. v. Clay*, 216 Ga. 581, 118 S.E.2d 581 (1961). Generally, the "mere silence" of a corporate officer accused of fraud, occupying such a fiduciary relationship with the shareholder, is sufficient to toll the statute. *Shipman v. Horizon Corp.*, 245 Ga. 808, 8009, 267 S.E.2d 244 (1980). Petitioners' cause of action clearly alleges the intentional fraud of the Respondent, and the officers and directors of a corporation that has engaged in that kind of activity can be held personally accountable under this theory of fiduciary and as grounds for piercing the corporate veil.

C. The District Court should have found Mutual Indemnity held Slautterbacks' 432,000 shares of preferred stock in a constructive trust, so as to apply Georgia's ten-year limitation period for actions against fiduciaries.

O.C.G.A. § 9-3-27 provides that "all actions against executors, administrators, guardians, or trustees, except on their bonds, shall be brought within ten years after the right of action accrues. In this case the Respondent should have been deemed to be the trustee of a constructive trust, and therefore subject to the ten-year limitation period.

For purposes in this case of determining the procedural issue of tolling of the limitation period, a constructive trust arises with respect to property the title to which was acquired

by fraud, or where, although acquired originally without fraud, it is against equity that the title should be retained by the one who holds it. *Aetna Life Ins. Co. v. Weekes*, 241 Ga. 169, 172, 244 S.E.2d 46 (1978); O.C.G.A. § 53-12-26. A constructive trust is merely a type of equitable remedy designed to provide relief against unjust enrichment. See generally 76 AmJur2d, Trusts, §§ 221-2. In an appropriate case, a plaintiff can obtain both an award of monetary damages and imposition of a constructive trust, as adequate relief can be afforded only through the use of both remedies. See, e.g., *Phoenix Airline Services, Inc. v. Metro Airlines, Inc.*, 194 Ga.App. 120, 390 S.E.2d 219 (1989); *Borden v. Sinskey*, 530 F.2d 478 (3rd Cir. 1976).

In this case, the Respondent should be deemed the trustee of a constructive trust with regard to the 432,000 shares of non-voting preferred shares of stock and the investment income on those shares, which Respondent held pending the scheduled redemption date of January 1, 1991. For purposes of tolling of the statute of limitations is a procedural rather than a substantive question controlled by the choice of law and limitations rules of the forum state, Georgia -- the District Court should have deemed the presence of a constructive trust and should have applied the ten-year limitation period prescribed by O.C.G.A. § 9-3-27.

Uberrimae fidei or "utmost good faith" is the guiding principle in Anglo-American reinsurance law. See C.E. Golding, *The Law and Practice of Reinsurance*. 4th Ed., (Brentford/Middlesex 1965). *Uberrimae fidei* is defined as "the most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight." This duty of utmost good faith is mutual; it is a duty owed by each party to the other. John S. Diaconis, "Utmost Good Faith and Rescission: Non-Disclosure of Material Facts in Reinsurance Agreements." *Reinsurance*

Litigation and Arbitration 192 (Practicing Law Institute 1995).

The requirement of *uberrimae fidei* was explained well by Justice Cardozo, before his ascension to the United States Supreme Court, in another context but fully applicable here as follows:

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee [or, in this case, a reinsurer] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1 (1928).

This duty of utmost good faith in the reinsurance context has been referred to as an "honorable engagement" and "honorable undertaking" which extends throughout the life of the agreement and may bind the parties years after its termination to a higher and continuing standard of contract performance and obligation, beyond the language of the agreement, not found in other arm's length contracts. Gang, "Developments in Litigation Involving Reinsurers, Cedents and Insureds," *Reinsurance Litigation and Arbitration 96* (Practicing Law Institute, 1995). "Parties to a reinsurance contract . . . have been described as partners in a marriage or in a business relationship, owing to each other the highest degree of fidelity." *Compagnie De Ressurance D'ile De France v. New England Reinsurance. Corporation*, 57 F.3d 56, 72 (1st Cir., 1995). "The hallmark of utmost good faith is absolute candor and honesty coupled with the absence of any concealment or deception." *Travelers Ins. Co. v. Buffalo Reins.*

Co., 86 iv 3369 (S.D.N.Y. June 18, 1991) (jury instructions set forth in trial transcript, quoted in Diaconis, *Reinsurance Litigation and Arbitration* (Practicing Law Institute, 1995).

Therefore, because Mutual Indemnity's role as reinsurer was inextricably bound together with its role as "rent-a-captive" and with its shareholder agreement with Slautterback, Mutual Indemnity owed to Slautterback a duty of the highest standard of fidelity, honesty and candor, free from any concealment or deception, beyond the language of contract or what is required in other types of arms-length business transactions. Upon such an obligation of absolute fidelity may a jury find the basis for a relationship of trust sufficient to toll the statute of limitations.

III. The Petition Should be Granted Because there is no United States Case Law Governing Rent A Captive, or Alternative to Reinsurance/Self-Insurance, and the Arrangement Constitutes 50% of all U.S. Citizens' Premium Dollars which are Transmitted to Offshore Entities

The alternative to reinsurance programs which are implemented through offshore rent-a-captives now constitute 50% of all premium dollars of United States insureds! There is no American case law governing this huge multibillion dollar business. There is no case law dealing with the tripartite arrangements, with the result that the Petitioner has had two courts to come to opposing conclusions, the one District Court determining that only one of the three contracts in the tripartite arrangement would be considered and without joining the other party to the tripartite arrangement, resulting in an out-of-context reading of an agreement that was only a third of the understanding of the parties, for without considering the three contracts together, the one contract would mislead the court as to the true relationship between the parties.

The other District Court, i.e., the trial court below, has

correctly adjudged the arrangement to be governed by a tripartite set of contracts, but has still been misled as to the role of each of the parties, e.g., thinking the Respondent a reinsurer, when in fact if the Shareholder Agreement is read closely in conjunction with the other two contracts it becomes obvious that the Respondent was merely an administrator of the premiums, for a fee and due no premiums, and not a traditional reinsurer which would require a portion of the premiums as consideration for taking risk as a reinsurer. Mutual merely served as a vehicle for passing underwriting profit and investment income to Slautterback. Mutual Indemnity's own World Wide Web sites, Wall Street prospectus and SEC Filings and Insurance Commissioner filings all say that it takes no risk, therefore, it cannot be a reinsurer and is what the Petitioner pleads it to be, a rent-a-captive, a device to facilitate the Petitioner being its own reinsurer, i.e., self-insured.

It is of vital concern to the American insurance industry that the highest court of this land define the role of an offshore rent-a-captive for what it is, an alternative to traditional reinsurance.

CONCLUSION

The District and Circuit Courts erred by determining that the statute of limitations begins to run when a party has the mere suspicion of the existence of fraud, as mere suspicion does not give rise to the "accrual" of a cause of action under *White v. Mercury Marine*, supra. The confidential relationships likewise toll the running of statutes of limitations, and for both these reasons, the Court should grant Certiorari and hear the appeal of the Petitioner. In addition, the District Court should have used the statute of limitations applicable to mutual accounts which provides that the limitations period begins to run from the last act to be performed which was the redemption of the shares of stock to take place on January 1, 1991, allowing

the timely filing of the case at bar. Finally, the District Court should have used the statute of limitations pertaining to claims against fiduciaries, a ten year statute of limitations, allowing the timely filing of the case at bar. Any one and each of these theories is proper on its own merits and legally sufficient to reverse the District and Circuit Courts.

This Court should reverse the Per Curiam Order of the United States Court of Appeals for the 11th Circuit of July 23, 1998, and the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, filed December 16, 1996, granting summary judgment and remand this case for further proceedings consistent with finding the limitation of actions was tolled until January 1, 1991, pursuant to O.C.G.A. § 9-3-7. Alternatively, the Court should reverse and remand for further proceedings consistent with the statutes of limitation having been tolled due to the concealment of fraud by the Respondent and Petitioners' discovery of the wrongful rescission of the Shareholder Agreement on or about March, 1989. Alternatively, the Court should reverse and remand for further proceedings consistent with the choice of the statute of limitations governing claims against fiduciaries.

Respectfully submitted,

Richard Young, #782650
Attorney for Petitioners
125 TownPark Drive, Suite 300
Kennesaw, Georgia 30144
770 420-8290

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8050

D.C. Docket No. 1:94-CV-3402-JEC

RICHARD D. SLAUTTERBACK, SANDRA L. SLAUTTERBACK, Trustee, AMERICAN OWNER OPERATOR UNDERWRITERS, INC., AMERICA TRUCK UNDERWRITERS HOLDING CORPORATION, INC.,

Plaintiffs-Appellants,

versus

IPC MUTUAL INDEMNITY, LIMITED,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(December 1, 1997)

Before TJOFLAT and BARRETT, Circuit Judges, and PROPST*, Senior U.S. District Judge.

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*Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against Plaintiffs-Appellants."

Entered: December 1, 1997
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk
ISSUED AS MANDATE: AUG 05 199

11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8050

RICHARD D. SLAUTTERBACK, SANDRA L. SLAUTTERBACK, Trustee, AMERICAN OWNER OPERATOR UNDERWRITERS, INC., AMERICA TRUCK UNDERWRITERS HOLDING CORPORATION, INC.,

Plaintiff-Appellants,

versus

IPC MUTUAL INDEMNITY, LIMITED,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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BEFORE: TJOFLAT and BARRETT, Circuit Judges, and PROPST*, Senior U.S. District Judge.

PER CURIAM:

The petition(s) for rehearing filed by the appellant is denied.

ENTERED FOR THE COURT:
s/ UNITED STATES CIRCUIT JUDGE
ORD-41

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*Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD D. SLAUTTERBACK, SANDRA L. SLAUTTERBACK, Trustee, AMERICAN OWNER OPERATOR UNDERWRITERS, INC., and AMERICAN TRUCK UNDERWRITERS HOLDING CORPORATION, INC.,

Plaintiffs,

v.

IPC MUTUAL INDEMNITY, LIMITED,

Defendant.

CIVIL NO. 1:94-cv-3402-JEC

ORDER

This case is presently before the Court on plaintiffs' Motion for Reconsideration of Order Denying Extension of Discovery [57], defendant's Motion for Summary Judgment [63], and plaintiffs' Motion to Amend More Definite Statement [68]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that plaintiffs' Motion for Reconsideration should be DENIED, defendant's Motion for Summary Judgment should be GRANTED, and plaintiffs' Motion to Amend More Definite Statement should be DENIED.

BACKGROUND

This litigation arises out of an insurance program which was formed in 1985. The program was comprised of a tripartite agreement between plaintiffs, defendant, and Colonial Penn, an insurance company which is not involved in the present lawsuit. The agreement allowed plaintiffs to sell insurance policies to truckers nationwide without becoming licensed to sell insurance in each state. (Pl. Resp. to Def. Mot. for Sum. J. [70] at 3.) The agreements were written so that plaintiffs would perform the primary functions of the insurer, such as claims handling, administration, and underwriting profits made on the program. (*Id.*) Colonial Penn, pursuant to an agency agreement with plaintiffs, essentially rented the use of its name and license to sell insurance to plaintiff. (*Id.* at 2.) Defendant acted as the reinsurer of the program. (*Id.* at 4.)

Pursuant to the tripartite agreement, premiums were collected by plaintiff, and subsequently sent by plaintiff to Colonial Penn under the agency agreement. (*Id.*) The premiums, less Colonial Penn's fee, were then sent to defendant by Colonial Penn pursuant to the reinsurance agreement. Defendant was obligated to return to plaintiffs funds from the premiums needed to pay any claims that arose. If the premium funds were not used, defendant was obligated to invest the premiums, returning to plaintiffs any premiums remaining, less claims paid and defendant's fee, in December of each year. These payments were to be made to plaintiffs pursuant to a shareholder agreement between plaintiffs and defendant, in the form of dividends on shares of stock of defendant's preferred series stock which the contract between plaintiffs and defendant obligated plaintiff to purchase with a $432, 000 letter of credit. (*id. at 4.*) On

January 1, 1991, defendant was to return to plaintiffs all money accumulated on the entire program that had not already been distributed. The letter of credit was also to be returned to plaintiffs on January 1, 1991 if it did not have to be used during the program to cover losses. The graphic illustration attached to defendant's motion for summary judgment clarifies the way the program worked. (*See Def. Mot. for Sum. J. [63] at Ex. "F".*)

Sometime in 1987 the parties began to experience problems wilth the program, and Colonial Penn filed a lawsuit against plaintiff alleging breach of contract. (*id. at 10.*) Soon after this, defendant signed an agrement to rescind its reinsurance agreement with Colonial Penn. Under the rescission agreement defendant agreed to return to Colonial Penn all premiums it had received under the program up to that point, less a $300,000 fee for its services. (*See Rescission Agreement, attached to Def. Mot. for Sum. J. [63] at Ex. "K".*) The agreement provided that no further premiums would be forwarded to defendant under its reinsurance contract with Colonial Penn. (*id.*) The agreement also required defendant to draw down plaintiffs' $432,000 letter of credit and place it in escrow pending the results of the litigation between plaintiffs and Colonial Penn. (*id.*) Thus, pursuant to the rescission of the reinsurance agreement the link whereby premuims flowed from Colonial Penn to defendant was destroyed.[1]

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1. The case between plaintiffs and Colonial Penn was tried in 1993, and resulted in a $5,637,039.00 verdict for Colonial Penn on its breach of contract claim.

Several months after the conclusion of the litigation between plaintiffs and Colonial Penn, on December 22, 1994, plaintiffs filed this lawsuit against defendant primarily on the basis of defendant's failure to comply with the shareholder agreement. Plaintiffs are alleging breach of contract, fraud, conversion, and conspiracy, as well as a Georgia Securities Act Claim. Defendant contends that all of plaintiffs' claims are barred by the statute of limitations, and has moved for summary judgment. In response to defendant's Motion for Summary Judgment, plaintiffs have filed Motion to Amend their More Definite Statement to add a claim for RICO violations. Plaintiffs have also moved the court to reconsider an Order entered on July 2, 1996 in which the Court refused to extend the time allowed for discovery.

DISCUSSION

I. *Plaintiffs' Motion for Reconsideration*

Plaintiffs have filed a motion for the Court to reconsider a discovery Order entered on July 2, 1996. In that Order the Court denied plaintiffs' Motion for Extension of Discovery and Motion to Compel Production of Documents. (*See Order [56].*) The Court also denied plaintiffs' Motion for Order that Matters are Admitted on Grounds of Insufficiency of Answer or Objection, but directed defendant to respond to plaintiffs' requests for admission by July 9, 1996. (*id.*) The Court issued its July 2nd Order before receiving plaintiffs' reply briefs, but within the time which plaintiffs allowed to file reply briefs. Plaintiffs thus urge the Court to reconsider their motions in light of the arguments in their reply briefs that the Court did not have an

opportunity to consider before entering the Order. The Court has now carefully considered plaintiffs' reply briefs in support of each discovery motion made and concludes that plailntiffs have not raised any new issues or made any arguments in their reply briefs which necessitate a change in the July 2, 1996 discovery Order.

A. *Motion to Compel Documents*

The Court noted in its prior Order considering plaintiffs' Motion to Compel Production of Documents that defendant's response indicated that it had disclosed all requested discovery in its possession. (*id. at 1.*) The Court ordered defendant to disclose all requested discovery within its constructive possession INSTANTER and warned defendant that it would be subject to contempt proceedings and sanctions if it were later discovered that it failed to turn over requested discovery. (*id. at 2.*) The Court does not see, and plaintiffs' reply does not demonstrate, the need for any additional relief to plaintiffs as to this request.

B. *Requests for Admission*

In its July 2nd discovery Order, in response to plaintiffs' Motion that Matters are Admitted on the Grounds of Insufficiency of Answer or Objection, the Court directed defendant to submit answers to plaintiffs' requests for admission by July 9, 1996. (*id.*) Defendant points out in its response to plaintiffs' Motion to Reconsider that it complied with the Court's Order and responded to plaintiffs' requests for admission by July 9th. (*See Def. Resp. to Pl. Mot. to Reconsider [61] at 2.*) Plaintiffs' reply, filed before defendant had an opportunity to comply with the Court's July 2nd Order, obviously does not address this issue. Given

defendant's response to plaintiff's requests for admission, the Court can provide no additional relief to plaintiffs with regard to this motion.

C. *Motion to Extend Discovery*

Plaintiffs' reply brief presents no new circumstances which convince the Court to change its prior Order denying plaintiffs' Motion to Extend Discovery. In a January 23, 1996 scheduling order *[33]*, the Court stated:

> [T]his case is on a four month discovery track. The parties are requesting an additional four month discovery period and the Court is allowing same. Accordingly, discovery expires on SUNDAY, JUNE 2, 1996. No extension of this dated will be granted except in exceptional cases where the circumstances on which the request is based did not exist or could not have been anticipated by counsel at the time the preliminary statement was filed. Parties cannot reserve the right to request additional discovery time. *See Local Rule 225-1 (b).*

In its July 2nd Order the Court pointed out that it had previously indicated to the parties that it would not entertain any motions for extension of discovery. (*Order [56].*) The Court also noted that this case, at the time of that Order, was over 18 months old and that there had been ample time for discovery. (*id.*)

Plaintiffs raise no new factual or legal issues in their reply in support of their Motion to Extend Discovery. As in their original brief supporting this motion, plaintiffs argue that discovery should be extended because defendant has failed to properly respond to discovery requests. (*See Pl.*

Reply in Support of Mot. to Reconsider [54] at 2.) Plaintiffs' argument that this allegation makes this case an exceptional one, meriting an extension of discovery, is no more persuasive in their reply than in their original brief in support of the motion. This case is not an "exceptional" on "where the circumstances on which the request [to extend discovery] is based did not exist or could not have been anticipated by counsel at the time the preliminary statement was filed." (Scheduling Order [33].) Accordingly, plaintiffs' Motion to Reconsider the Court's Order refusing to extend discovery is denied.

II. *Plaintiffs' Motion to Amend its More Definite Statement*

Plaintiffs have filed a motion requesting leave to amend their more definite statement in order to "clarify" their statement of a claim against defendant for violating the Georgia and federal RICO statutes, 18 U.S.C. § 1961 et seq.[2] Plaintiff makes this motion in response to defendant's Motion for Summary Judgment in which RICO was not discussed. Plaintiffs' Motion to Amend, filed on September 17, 1996, is in fact the first filing from either party which mentions the possibility of a RICO claim.

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2. As "Georgia RICO's similarity to federal RICO has prompted federal courts to apply the same analysis to both statutes," the Court will discuss only plaintiffs' federal RICO claim. *Bowers v. Dairymen, Inc.*, 813 F. Supp. 1580, 1585 (S.D.Ga. 1991); *see also Morastu v. Lance*, 631 F. Supp. 474, 481 (N.D. Ga. 1986) (holding same).

Plaintiffs initially contend that the addition of a RICO claim does not require an amendment to their More Definite Statement. Relying on the liberal pleading rules of the Federal Rules of Civil Procedure, plaintiffs argue that their More Definite Statement already contains a "short and plain statement showing that [plaintiffs] are entitled to relief" under RICO, satisfying the minimal pleading requirements of Rule 8(a). (Pl. Mot. to Amend [68] at 2.) Plaintiffs' argument is without merit because although the pleading standard is liberal, plaintiffs' pleading should still serve to give defendant "fair notice of what plaintiffs' claim is and the grounds upon which it rests." *Quality Foods v. Latin Am. Agribusiness Devel., 711 F.2d 989, 995* (11th Cir. 1983) (*citing Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 103 (1983)). Plaintiffs' More Definite Statement fails to provide any kind of notice to defendant of potential liability under the Georgia or federal RICO statutes.[3]

Plaintiff rely on the fact that their More Definite Statement describes the facts surrounding their fraud, conversion, and conspiracy claims, and that these same facts are sufficient to state a claim for violating RICO. (Pl. Mot. to Amend [68] at 2.) While it is true that RICO violations often involve fraud or conspiracy, several elements must be plead in order to state a RICO claim. A plaintiff must plead:

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3. This conclusion becomes quite clear when considering defendant's Motion for Summary Judgment. In its motion, defendant appears to have addressed any claim that plaintiffs' More Definite Statement could possibly be construed to contain—including a claim for Georgia Securities law violations to which plaintiff did not even respond. (*See* Def. Mot. for Sum. J. [63].) That defendant never discussed RICO suggests that plaintiffs' More Definite Statement failed to provide notice of a RICO claim.

(1) The conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Durham v. Business Mgmt. Assoc.*, 847 F.2d 1505, 1511 (11th Cir, 1988) (quoting *Sedima S.P.R.L. v. Inex Co., Inc.*, 473 U.S. 479, 105 S. Ct. 3275 (1985)). Plaintiffs'More Definite Statement does not allege a "pattern of racketeering activity" or point to the existence of a criminal "enterprise." *See Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir. 1992) (dismissing RICO claim and stating that "plaintiffs must sufficiently allege each element of a RICO violation and its predicate acts of racketeering with particularity, a requirement justified by the threat of treble damages"); and *Miranda v. Ponce Federal Bank*, 948 F. 2d 41, 44 (1st Cir. 1991) (stating that "because Civil RICO is an unsually potent weapon.....a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged"). *See also Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1251 (7th Cir. 1989) (holding that "it is essential to plead precisely in a RICO case the enterprise alleged and the RICO section allegedly violated").

Because plaintiffs' More Definite Statement is insufficient as it is currently written to state a claim for RICO violations, an amendment to plaintiffs' More Definite Statement is required in order for plaintiff to pursue its claims under RICO. Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading as a matter of course at any time before a responsive pleading is served. Because defendants have not consented to plaintiffs' amendment and because defendants have filed a responsive pleading to plaintiffs' complaint, the Court must grant plaintiffs leave to amend before they may amend the

complaint.

Rule 15(a) provides that leave to amend a pleading shall be "freely given when justice so requires." "Courts have interpreted [amendment] provisions liberally, in line with the Federal Rules' overall goal of resolving disputes, insofar as possible, on the merits and in a single judicial proceeding." *Spartan Grain & mill Co. v. Ayers, 517 F.2d 214, 220 (5th Cir. 1975).*[4] In explaining the amendment standard, the Eleventh Circuit haas observed that "unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989). In determining whether a substantial reason exists to deny leave to amend, the district court should consider the following facts: (1) undue delay, bad faith, or dilatory motive on the part of the movant, (2) repeated failure to cure deficiencies by amendments previously allowed, (3) undue prejudice to the opposing party by virtue of the allowance of the amendment, and (4) futility of amendment. *Nolin v. Douglas County*, 903 F.2d 1546, 1550 (115h Cir. 1990.

The Court denies plaintiffs' Motion to Amend on the basis of plaintiffs' undue delay. As defendant points out, the reason that RICO was not discussed in its Motion for Summary Judgment is that RiCO was not mentioned by any

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4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981.

party prior to plaintiffs' Motion to Amend, which was filed on September 17, 1996. Plaintiff makes this motion over a month after defendant has filed for summary judgment, and over three months after the completion of discovery. Plaintiffs have offered no explanation as to why they did not bring their RICO claim at the time of filing the original complaint or in their More Defenite Statement. By their own argument plaintiffs were aware of the facts underlying this claim when the action was brought, but delayed until after the discovery period and would subject defendants to further expense as a result of plaintiffs' dilatory actions.

Although amendments to complaints are to be liberally granted "when justice so requires." plaintiffs' attempt to amend the complaint tat this late stage of the proceedings cannot be allowed. Plaintiff has filed this motion over a month after defendant filed its Motion for Summary Judgment, over three months after completion of discovery, and almost two years after the initial complaint was filed. *See Local 472, Etc, v. Georgia Power Co.,* 684 f.2D 721, 724 (11th Cir. 1982) (upholding denial of motion to amend filed two years after action instituted, after discovery was complete, and after defendants had filed motions for summary judgment); *Williams v. Mun. Water Works,* 21 F.3d 218 (8th Cir. 1994) (upholding denial of motion to amend complaint where motion was filed 14 months after original complaint was filed and six days after discovery cutoff date); and *Coleman v. Ramad Hotel Operating Co.,* 933 F. 2d 470, 473 (7th Cir. 1990) (denial of motion to amend upheld where filed at close of discovery, a month after defendant filed motion for summary judgment).

Plaintiffs' argument that allowing the amendment will not alter the defendant's current defense strategy is

unpersuasive. Defendant has taken four depositions and in all of them asked questions relevant to establishing statute of limitations and collateral estoppel defenses for all claims which plaintiffs' complaint could be construed to contain, including breach of contract, fraud and tort claims, personal claims of plaintiff, and even a Georgia Securities Act claim. (*See* pl. Resp. to Def. Mot. to Amend [71] at 5). Plaintiff contends that it wishes to clarify the existence of the RICO claim "so, if [d]efendant believes they have a summary judgment claim in regards to the RICO claim they can assert them now so as to have all the issues before the Court." (Pl. Mot. to Amend [68] at 2-3). At this point, however, when defendant has already filed for summary judgment, and when discovery ended three months ago, all of the issues should already before the Court.

Moreover, plaintiffs have offered no explaination of their decision to wait until this particular time to move to amend their More Definite Statement. Plaintiffs claim that this motion was inspired by their discovery in May of 1996 of defendant's division of money which belonged to plaintiffs. (Pl. Mot. to Amend [68] at 2.) Plaintiffs do not explain, however, why they did not file this motion in May, before discovery ended and before defendant filed its Motion for Summary Judgment. Also, this money was divided as part of the distribution of an escrow account that was established several years ago and of which plaintiffs have at all times been fully aware. Allowing plaintiffs to amend their More Definite Statement to add a RICO claim, which subjects defendant to potential liability for treble and punitive damages, at this stage in the litigation would unduly prejudice defendant. Accordingly, plaintiffs' Motion to Amend their More Definite Statement to add a RICO claim is denied.

III. Defendant's Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule t6 of the Federal Rules of Civil Procedure *mandates* the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrettt,* 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-23.

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at323; *Apocoa, Inc. v. Fidelity Nat'l Bank,* 906 F.2d 610, 611 (11th Cir. 1990). However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely "showing" -- that is, pointing out to the district court --that there is an absence of evidence to support the non-moving party's case." *Celotex,* 477 U.S. at 325. After the movant has carried his burden, the non-moving party is then required to "go beyond the pleading" and present competent evidence[5] designating "'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ.

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5. The non-moving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. *Celotex,* 477 U.S. at 324.

P.56(e)). While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, *Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986).

A fact is material when it is identified as such by the controlling substantive law. *Id.* at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-250. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is 'merely colorable" or is "not significantly probative." *Anderson,* 477 U.S. at 249-50. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of *every* element material to that party's case so as to create a genuine issue for trial.

B. Statute of Limitations

Plaintiff's More Definite Statement states claims for breach of contract, conspiracy, fraud, conversion, tortious interference with contract and violations of Georgia security laws. Defendant contends that all of plaintiffs' claims are barred by the statute of limitations. The parties agree that Georgia law governs the statute of limitations issue. (*See*

Pl. Brief in Resp. to Def. Mot. for Sum. J. [70] at 18).

1. *Plaintiffs' Georgia Securities Law Claim*

Plaintiffs failed to respond to defendant's statute of limitations defense as to plaintiffs' claim under the Georgia Securities Law statute, O.C.G.A. § 10-5-14. Section 10-5-14(e0 of this statute requires that a cause of action commence within two years of the date of the transaction upon which the action is based. Plaintiffs do not contest defendant's assertion in its brief that the sale of stocks on which plaintiff bases its Georgia Securities Law claim occurred in 1985, and that the two year statute of limitations has long since run on this claim. The Court thus grants summary judgment to defendant on plaintiffs' Georgia Securities Law claim.

2. *Plaintiff's Breach of Contract Claims*

The statute of limitations for breach of contract is six years under Georgia law. O.C.G.A. § 9-3-[illegible] provides that "all actions upon simple contracts in writing shall be brought within six years after the same become due and payable." The begins to run when a cause of action for breach of contract accrues, which is at the time of the breach. *Owen v. Mobley Construction Co.*, 171 Ga. App. 462, 320 S.E. 2d 255 (1984).

Plaintiffs filed the original complaint in this action on December 24, 1994. Any claims for breach of contract included in the complaint are thus barred if the breach occurred before December 24, 1988. It is established beyond question in plaintiff Slautterback's deposition that the breach of contract on which plaintiffs' action is based occurred in December of 1987, when defendant signed a rescission agreement with Colonial Penn. The following

exchange occurred in plaintiff's deposition:

> Q: Is it [plaintiff's] contention in this lawsuit that [defendant] somehow breached its contract with [plaintiff] when it rescinded the quota share reinsurance agreement that it had with Colonial Penn?
> A: Absolutely
> Q: Is it [plaintiff's] position that [defendant] somehow breached its contract with [plaintiff] when it placed the $ 432, 000 in an escrow account?
> A: Both of which were in secret.

(Slautterback Depo. at 24-25, attached to Def. Mot. for Sum. J. [63] at Ex. "J".) The rescission of the reinsurrance agreement and the placement of the $432, 000 in escrow occurred in December of 1987, over six years prior to when plaintiff filed this action in December of 1994. (*See* Rescission Agreement, attached to Def. Mot. for Sum. J. [63] at Ex. "K").

Indeed, given the way in which the three contracts comprising the insurance program at issue here worked together, the only logical conclusion is that defendant breached its contract with plaintiff, if at all[6], when it signed the rescission agreement with Colonial Penn in 1987. As explained, defendant was obligated, under its contract with

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6. Defendant contends that execution of the rescission agreement was not actually a "breach" because at the time of its execution plaintiffs' actions had already caused a breakdown of the entire insurance program justifying the rescission. (Def. Mot. for Sum. J. [63] at 15.) The Court does not decide whether defendant breached its contract with plaintiff by signing the rescession agreement, but works from the assumption that if a breach occurred, it occurred when the rescission agreement was executed.

plaintiffs, to accept premiums from Colonial Penn, to pay claims from these premiums, and to invest the remainder of the money. The investment income and profits made on the program were to be returned to plaintiffs in December of each year, and all of the profits made on the entire program were to be returned to plaintiffs on January 1, 1991. Defendant was also obligated to cancel plaintiff's $432, 000 letter of credit on January 1, 1991. The 1987 rescission agreement brought this entire program, which involved a continuous flow of funds from plaintiffs to Colonial Penn, then from Colonial Penn to Defendant and eventually from defendant back to plaintiffs, to a halt. The rescission agreement obligated defendant to return all premiums it had received under the program, less its own $300,000 fee, to Colonial Penn. (*See* Rescission Agreement, attached to Def. Mot. for Sum. J. [63] at Ex. "K"). The agreement provided that no additional funds would flow from Colonial Penn to defendant under this program. (*Id.*) Pursuant to the rescission agreement defendant also drew down plaintiff's $432, 000 letter of credit and placed it into escrow. (*Id.*)

Thus in complying with the rescission agreement, defendant stopped receiving the premiums from Colonial Penn which defendant's contract with plaintiffs obligated it to invest and ultimately return to plaintiffs. Moreover, because defendant drew down plaintiffs' letter of credit and placed the proceeds in escrow, defendant could not possibly have had anything to return to plaintiffs on the "redemption date" of the contract, January 1, 1991.

Plaintiffs' attempt to resurrect its breach of contract claim pursuant to the "divisible contract" doctrine is unpersuasive. Although Georgia law provides that the statute of limitations runs separately as to each individual

breach of a divisible contract, the contract between plaintiff and defendant was not divisible. *See* O.C.G.A. § 13-7-14 (providing that an action will lie for each breach of a contract found to be severable). A contract is only divisible where "the whole performance is divided into two sets of partial performances, each part of each set being the agreed exchange for a corresponding part of the set of performances to be rendered by the other promisor." *Piedmont Life Ins. Co. v. Bell,* 103 Ga. App.. 225, 235, 119 S.E. 2d 63, 71 (1961).

Although plaintiffs would characterize defendant's obligation to make yearly payments of investment income, as well as defendant's obligation to returns plaintiffs' letter of credit and all monies accumulated fromoperation of the program to plaintiffs on January 1, 1991, as independent obligations, an examination of the contract between plaintiffs and defendant illustrates that these obligations of defendant were an inseparable part of the entire insurance program. The contract provides that "*if* on the redemption date defendant continues to hold funds pursuant to the treaty with the insurance company (Colonial Penn)," defendant will make a final payout of these funds on January 1, 1991. (*See* Shareholder Agreement,, attached to P1. Resp. to Def. Mot. for Sum. J. [70] at Ex. "3"). The contract thus provides for the return to plaintiff, on January 1, 1991, of *all* profits and investment income accumulated from the operation of the entire insurance program. Plaintiffs' letter of credit was also part of the consideration given for the entire contract, as it was to remain in defendant's possession from the initiation until the termination of the contract, at which time it was to be returned to plaintiffs if lossess incurred on the program did not necessitate its use. (*Id.*)

The contract between plaintiffs and defendant does not evidence an intent by the parties to divide the contract into yearly sets of performance. On the contrary, the yearly return to plaintiff of income and profits accumulated on the program seem to be merely a convenient manner of periodically ceding the plaintiff portions of the underwriting profit on the program. All of defendant's obligations were part of a single promise based on a single consideration. This promise was breached, if at all, when defendant removed itself from the program by signing a rescission agreement in 1987. The rescission agreement severed the treaty between defendant and Colonial Penn which provided the flow of funds from which defendant was to make investments and yearly payments to plaintiffs, completely terminating defendant's participation in the insurance program. Plaintiffs' breach of contract claim thus cannot survive defendant's Motion for Summary Judgment on the basis of the "divisible contract" doctrine.

Plaintiffs argue further that the statute of limitations on its breach of contract claim was tolled by fraud on the part of defendant which deterred plaintiffs from bringing their action. O.C.G.A. § 9-3-96 provides that "if the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." under this code section "time of discovery of the fraud" means the time at which the fraud is or should have been discovered in the exercise of reasonable diligence. *Stricker v. Epstein,* 213 Ga. App. 226, 229, 444 S.E. 2d 91, 94 (1994). The failure to use reasonable diligence to discover fraudulent acts which deter a plaintiff from bringing an action may be excused, however, where there is a confidential relationship between

plaintiff and defendant. *Shipman v. Horizon Corp.*, 245 Ga. 808, 267 S.E. 2d 244 (1980).

The only fraudulent act plaintiff alleges as deterring plaintiffs from filing suit until December of 1994 is defendant's preparation of false financial statements. Plaintiffs' reliance on this action by defendant to invoke O.C.G.A. § 9-3-96 is undermined, however, by plaintiff slauterback's admissions in his deposition that he was aware of defendant's alleged frauduent conduct long before December of 1988, which is the point to which the statute of limitations has to be tolled in order to save plaintiffs' breach of contract action. The following exchange occurred in plaintiff's deposition.

> Q: When did you first become aware of the fraudulent conduct of [defendant]?
>
> A: Just shortly after the shareholder meeting which we attended on June 4th, June 5th, 1986.

(Slautterback Depo. at 33.) Then later in the deposition:

> Q: Let me ask you--let me rephrase the question. Weren't you aware that by your own allegations the shareholder agreement had been breached a good while before [1991]?
>
> A: We were aware right after the shareholder meeting in 1986 that there was something bad wrong, the fidelity was not there, but we could not . . . make an allegation or file a suit without something tangible in hand.

(*Id.* at 43, attached to Def. Mot. for Sum. J. [63] at Ex. "J".) As to the last sentence of plaintiff quoted above, see *Owen*,

171 Ga. App. at 463 (stating that "mere ignorance of facts constituting a cause of action does not prevent the running of a statute of limitations).

Moreover, the record contains items of correspondence and documents confirming plaintiffs' awareness of defendant's allegedly fraudulent conduct prior to December of 1988. Defendant apparently stopped making payments to plaintiffs, pursuant to the rescission agreement with Colonial Penn, in 1987. On September 25, 1987 plaintiffs' attorney wrote a 1987. On September 25, 1987 plaintiffs' attorney wrote a demand letter to defendant requesting the return of plaintiffs' letter of credit and investment income. (*See* Def. Mot. for Sum. J. [63] at Ex. "R"). On March 17, 1988 plaintiffs' attorney wrote another letter demanding the return of premiums held, charging defendant with unlawfully drawing down its letter of credit, and threatening to "advise the insurance commissioners of the 50 states of [defendant's] attitude and proceed with such other actions as this situation may warrant." (*See* Def. Mot. for Sum. J. [63] at Ex. "S").

Plaintiffs present absolutely no evidence in response to these items of correspondence from which the inference can be drawn that plaintiffs were deterred by defendant's fraudulent conduct from bringing suit until December of 1994. Plaintiffs instead rely on the assertion that there was a confidential relationship between plaintiffs and defendant, suggesting that the existence of this relationship alone tolls the statute of limitations whenever fraud is alleged. (*See* Pl. Resp. to Def. Mot. for Sum. J. [70] at 15). Although a confidential relationship may excuse the use of diligence in discovering fraud on the part of defendant, the existence of a confidential relationship does not help plaintiffs' case

because plaintiffs admit to having actual knowledge of the alleged fraudulent conduct of defendant. A plaintiff seeking to invoke O.C.G.A. § 9-3-96 must be deterred from filing an action. *See Jim Walter Corp. v. Ward,* 245 Ga. 355, 356, 265 S.E. 2d 7, 9 (1980) (recognizing that fraud sufficient to toll statute of limitations under O.C.G.A. § 9-3-96 must be fraud that conceals existence of a cause of action from plaintiff); and *Averill v. Akin,* 219 Ga. App. 32, 33, 463 S.E. 2d 730, 731 (1995) (holding that shareholder attempting to invoke § 9-3-96 on basis of a confidential relationsip cannot "negligently refuse to acquire knoledge that was open and available to him through the inspection of corporate books and records").

There is simply no evidence that defendant committed any act of fraud which concealed plaintiffs' cause of action or in any sense deterred plaintiffs from filing suit until after December 21, 1988. Even assuming a confidential relationsip between plaintiffs and defendant, as well as fraudulent behavior on the part of the defendant in an attempt to conceal plaintiffs' cause of action, plaintiffs cannot invoke § 9-3-96 to toll the statute of limitations on their breach of contract claim because statement by plaintiff Slautterback in his deposition, as well as several items of correspondence, establish plaintiffs' knowledge of the existence of a cause of action for breach of contract well before December of 1988. Because the statue of limitations on plaintiffs' breach of contract claim began to run when the contract was breached in 1987, and because the contract was not divisible and the statute of limitations was not tolled by fraud on the part of defendant, the Court grants summary judgment to defendant on plaintiffs' breach of contract claim.

3. *Plaintiffs' Tort Claims*

Plaintiffs' More Definite Statement contains tort, conspiracy, fraud, conversion and tortious interference with contract claims, all of which are subject to the four year statute of limitations in O.C.G.A. §§ 9-3-31 and 9-3-32. *See McLendon v. Georgia Kaolin Co.*, 782 F.Supp. 1548 (M.D. Ga. 1992) (recognizing that O.C.G.A. § 9-3-31 is applicable to actions seeking damages for fraud). Those code sections provide that "actions for injuries to (or the conversion of) personalty shall be brought within four years after the right of action accrues." O.C.G.A. § 9-3-32. Like plaintiffs' claim for breach of contract, plaintiffs tort, fraud and conspiracy claims are primarily based on the 1987 rescission agreement between defendant and Colonial Penn. Plaintiffs allege that defendant "entered into a secret contract whereby the [p]laintiffs were deprived of any and all profit or benefit under the program, and [Colonial Penn] agreed to hold the [d]efendant harmless form any section taken by the [p]laintiffs." (Pl. Brief in Resp. to Def. Mot. for Sum. J. [70] at 23.) "As part of their fraud, conspiracy, and plan of conversion," plaintiffs further state, "the Defendant also entered into a secret escrow agreement with [Colonial Penn]." (*id.*) Plaintiffs are thus relying on the 1987 rescission agreement between defendant and Colonial Penn as the basis of their fraud, conversion and conspiracy claims.

Plaintiffs admit to having had an opportunity to read the rescission agreement between defendant and Colonial Penn in March of 1989. (*See* Slautterback Depo. at 33, attached to Def. Mot. for Sum. J. [63] at Ex. "J" (stating that letter plaintiff received in March of 1989 "was the last piece of the puzzle to show fraud")). Plaintiff Slautterback also says in his deposition that he was aware of " things

going on behind the scenes" as early as 1986. (*Id.*) Also, as discussed while considering plaintiffs' breach of contract claim, several items of correspondence in the record establish that plaintiffs were aware of actions taken pursuant to the rescission agreement, for example defendant's failure to make income and profit payments and defendant's drawing down plaintiff's letter of credit, in 1987. (*See* Def. Mot. for Sum. J. [70] at Ex. "R" and Ex. "S".)

Plaintiffs' attempt to revive their claim with the "continuing tort" theory cannot be entertained. The continuing tort theory is only applicable to cases involving personal injury. *Stocks v. Glover,* 220 Ga. App. 557, 588, 469 S.E. 2d 677, 678 (1996) (*citing Corp. of Mercer Univ. v. Nat. Gypsum Co.,* 258 Ga 363, 368 S.E. 2d 732 (1988)). Plaintiffs' complaint does not state a claim for personal injury.

Plaintiffs' argument that the statute of limitations has not run on its conspiracy claim because several separate acts, some of which were completed within the statute of limitations, combined to make up the conspiracy is also unpersuasive. In the same manner in which they tried to revive their breach of contract claim, plaintiffs attempt to characterize defendant's refusal on January 1, 1991 to redeem stock under the shareholder agreement as an independent act. Plaintiffs contend that this act was in furtherance of the conspiracy alleged in plaintiffs' complaint. (*See* Pl. Brief in Resp. to Def. Mot. for Sum. J. [70] at 23.) Plaintiffs also point to a division of funds in 1994 between defendant and Colonial Penn as an act in furtherance of the alleged conspiracy. (*Id.* at 25.) Both of these actions were taken, however, pursuant to the rescission agreement which was executed in 1987 and about which

plaintifff had knowledge at least by March of 1989. The agreement specifically provides that these funds would be placed in escrow until the completion of litigation between plaintiff and Colonial Penn. (*See* Rescission Agreement, attached to Def. Mot. for Sum. J. [63] at Ex. "K".) As discussed, the agreement also expressly provides for the return of all premiums to Colonial Penn and the termination of the agreement by which funds would flow to defendant and, from defendant, eventually to plaintiffs. (*Id.*) Plaintiffs have thus failed to produce any evidence that defendant committed any act of fraud, conspiracy or conversion within the period of limitaions for maintaining these actions. Accordingly, the Court grants summary judgment to defendant on plaintiffs' tort, fraud, conversion, and conspiracy claims.

CONCLUSION

For the foregoing reasons, the Court concludes that plaintiffs' Motion for Reconsideration is DENIED, plaintiffs' Motion to Amend its Complaint is DENIED, and defendant's Motion for Summary Judgment is GRANTED.

SO ORDERED, this 13 day of December, 1996.

s/ JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

APPENDIX D

AS&K GUIDE

Section 5 - SPECIAL TYPES OF INSURANCE VEHICLES

A. Rent-A-Captives Revisited

Bermuda has long been recognized as the domicile of choice for the world's captive insurance industry. One reason for Bermuda's preeminence is the success of arrangements which may be structured under its insurance laws, which offer alternatives to more conventional risk management options available in the *"traditional markets"*.

A *"captive"* is a closely-held insurance company whose insurance business is primarily supplied and controlled by its owners - in the sense that the owners have and exercise direct involvement and influence over the company's major operations, such as its underwriting, claims management and investment policies - and in which the original insureds are the principal beneficiaries. The *"rent-a-captive"* represents an evolution of the *"captive"* insurance company, and has been employed for specialized situations for nearly as long as more standard forms of captives have been operated.

A rent-a-captive program can be structured so that effectively unrelated parties may participate in the underwriting profits generated by the risks which they insure (or arrange to insure) via the captive. In addition, rent-a-captive policyholders (or the owners of such policyholders) may by negotiation secure a significant degree of influence over both the investment of underwriting reserves maintained by the captive in respect of the programs with which they are associated, and control the rate of the *"flow of funds"* through the captive (in the sense of the timing of

permitted distributions). Such advantages over traditional insurance arrangements have long been the hallmark of the rent-a-captive, and in recent years innovations in Bermuda insurance laws have extended the options for structuring rent-a-captives, leading to a resurgence of interest in their use.

1. What is a Rent-a-Captive?

A rent-a-captive is a company, typically established in an offshore domicile like Bermuda, which *"rents"* its capital surplus and legal capacity to engage in underwriting activities (i.e. its insurance license) to policyholders who are not its voting shareholders. The rent-a-captive will often provide its policyholders *("program participants")* with required administrative services. As such, the term *"rent-a-captive"* applies to any arrangement where the insured party obtains equivalent benefits to those provided by standard forms of captives without actually participating in ownership or management.2

One of the principal characteristics of a rent-a-captive is that the account established for each program participant is segregated in some manner from accounts established for other program participants. This is done to achieve a separate accounting basis for the insurance business attributable to each program participant. Such segregation may be accomplished administratively by the rent-a-captive itself, or there may be a full legal segregation which results in statutory protection for losses attributable to other program participants.

2. Advantages of a Rent-a-Captive

Rent-a-captive programs have long been acknowledged as alternatives to commercial insurance and as structures which offer more cost-effective and flexible risk management

solutions, particularly with regard to workmen's compensation but also for general liability, automobile liability and professional liability programs.

A rent-a-captive program offers program participants many of the advantages of a wholly-owned captive without requiring the insured party (or its owners) to make an equivalent commitment to fund the captive's start-up and management expenses. These advantages include the facility to customize the insurance programs and control premiums, pricing and access to reinsurance. Establishment of the rent-a-captive in a select domicile (e.g. Bermuda) results in favorable (yet responsible) governmental regulation. Additionally, the rent-a-captive can often secure coverage for specialized risks when this is unavailable in the commercial insurance markets. However, the main advantage of rent-a-captives may lie in enabling the program participants to obtain a return of underwriting profit and investment income earned on the reserves held in their respective insurance programs. Such returns will of course depend on the loss experience of the particular case.

Typically, each program participant will retain a portion of its own risks, insuring the balance with the rent-a-captive. This arrangement creates powerful incentives to program participants to be proactive with loss control and claims handling measures. Such measures will often be co-ordinated by agreement between the program participant and the rent-a-captive, and perhaps with professional claims handling service providers.

3. Ownership and Corporate Structure

There are various ways to own and structure a rent-a-captive, depending on whether the proposed program participants are single corporations, or a group or association. There may be

tax and other factors to consider, from the standpoint of both the proposed program participants and the sponsors of the rent-a-captive.

One of the more common rent-a-captive structures involves the sponsors forming a *Holding Company* which owns 100% of the voting shares of a *Reinsurance Subsidiary*. The Reinsurance Subsidiary in turn reinsures each program participant, in association with an *Issuing Carrier* which issues the policies of insurance to the program participants. The Issuing Carrier will usually be an insurance company which is licensed in the jurisdiction(s) in which the program participants are resident. The program participant will be afforded access to the rent-a-captive program when it arranges for a policy to be issued by the Issuing Carrier and, in association with this, it will purchase one or more preferred non-voting shares in the Holding Company. Such shares will be purchased pursuant to the provisions of a shareholder agreement wherein the Holding Company agrees to cause a dividend to be declared to the owner of record of the preferred shares. Dividend payments will also be controlled by the shareholder agreement, e.g. on a date indicated in an appendix, being an annual payment date or the termination date of the particular program. Dividends will be calculated according to a specific formula involving investment income earned and underwriting gain or loss. Payment of dividends will be subject to the availability of surplus funds (i.e. surplus of the statutory reserve requirements) in the related account.

The shareholder agreement will provide for indemnification of both the Holding Company and Reinsurance Subsidiary by the program participant, the indemnity being designed to protect these entities in respect of any net underwriting losses, loss expenses and collateralization expenses arising from the related insurance program. As collateral for this

indemnity, the program participant will usually agree to provide the Reinsurance Subsidiary with a letter of credit (or substitute cash collateral).

The shareholder agreement will also provide for the payment by the program participant of all premiums due to the rent-a-captive. Failure will constitute a material breach of the agreement. The amount of any such non-payment, together, together with interest may be deducted from any surplus reserves held for the account of the particular program, or any dividend due to the program participant.

Dividends on the preferred shares issued to each program participant will be declared and paid separately, i.e. as a separate class or series. Such shares will also be redeemable at face value upon the termination of a program. However where the capital required for the particular program has been *"rented"* from the rent-a-captive, the shares will be redeemed less financing costs.

In other cases, the structure may not involve a holding company, leaving a reinsurance company which stands alone as the rent-a-captive. In such an arrangement, it will be this stand-alone reinsurance company which issues the preferred shares and enters into the shareholder agreement with the program participant. This alternative is not otherwise different from the structure illustrated above.

A growing number of rent-a-captives use a private Act of the Bermuda Legislature, a sample of which is provided in the following Exhibit, so that they may achieve legal segregation of the assets and liabilities of each insurance program which they underwrite, so that there is no potential for *"cross liability"* of one such program resulting from the experience of another. Where the rent-a-captive is so structured (and

depending upon the precise language of the private Act), the complete segregation of each program participant's account can be achieved, the assets from each program participant being isolated and protected from the liabilities of other program participants and the failure of the rent-a-captive itself.

The advantages of such a structure will be clear. Pursuant to the typical provisions of such a private Act, a liquidator is as a matter of law bound to recognize the separate nature of the segregated account established for each program, and may not apply assets identified as the assets of any one program to pay claims of insureds under other policies issued by the rent-a-captive, or the rent-a-captive's non-insurance creditors. In addition, the liquidator typically has no power to void or cancel the terms of any policy, deed or contract issued in respect of any program.

Not all rent-a-captives will be structured to take the benefits afforded by private Acts of this kind. Some rent-a-captive owners take the view that their program participants may not be able to deduct premiums for tax purposes if there is demonstrably less risk-sharing among program participants.

Rather than issue preferred shares, some rent-a-captives simply enter into a form of profit sharing agreement with their program participants. This is an alternative means by which program participants may directly participate in the underwriting and investment income arising out of their respective programs.

4. How does the Rent-a-Captives Work?

In the typical scenario, the program participant (either on its own or with the assistance of a broker or the rent-a-captive or

both) will negotiate with the Issuing Carrier, which will be an admitted insurance company (or *"fronting"* company) for the provision of policy-issuing and related services in the relevant jurisdiction for the policyholder. The fronting company will then issue the policy and cede the working layer to the rent-a-captive. For this service, the fronting company charges a fee, which may range anywhere from 5%-14% of gross premium. The fronting company will also be required to deduct certain federal and/or state taxes. As a matter of law, the fronting company will be primarily liable for the risk. However, the reinsurance agreement with the rent-a-captive will invariably require the latter to provide the fronting company with a clean, irrevocable letter of credit. The letter of credit is ultimately paid for a backed by the program participant, typically as a one time charge of 1/2% of premium, or an annual fee of 3/8% of the premium deducted from the dividend. The guarantee for the letter of credit is the program participant's own funds held by the rent-a-captive. In addition, the rent-a-captive itself will charge an underwriting fee of perhaps 2%-3 1/2% of premiums.

5. Capital Requirements

In order to meet the Bermuda premium underwriting requirements (i.e. the ratio of premium to capital and surplus), a program participant must itself either provide or *"rent"* the necessary capital. If the program participant elects to rent, the rent-a-captive will often supply such funds from its own common share capital (usually for a fee of 1%).

Where capital is provided by the program participant, this is generally accomplished through the purchase of the rent-a-captive's prefereed non-voting shares, in an amount equal to 1/5th of the first year's net premium.

Purchasing the shares acchieves two purposes. First, it

provides the rent-a-captive with adequate capital for regulatory purposes. Second, as ownership of the shares constitiutes beneficial ownership of the rent-a-captive, it may provide a basis for the taxable transfer of income back to the program participant through deemed dividends.

6. Rent-a-Captive Account Expenses

Rent-a-captive account expenses are typically 25%-35% of original gross premium (*"OGP"*), although they can be higher. These include boards, bureaus, taxes and assessments (3%-4%), claims handing (3%-4%), onshore broker commission (4%-5%) federal excise tax (1%), cost of specific excess (3%-6%), cost of aggregate excess (2 1/2%-4%), fronting company fees (5%-9%), rent-a-captive's underwriting fee (2%-3 1/2%) and use of rent-a-captive's capital and what is left after fees and commissions (generally 60%-70% of OGP) and loss reserves may be temporarily available to the program participant. Meanwhile, the rent-a-captive will invest these funds (typically through a professional investment adviser in order to maximize investment portfolio performance) and return investment income to the program participant through dividends on the prefeered shares, less a service income fee to the rent-a-captive (generally 1% of the value of the portfolio).

Provided that the rent-a-captive complies with applicable minimum solvency and liquidity ratio requirements (or, where there are segregated accounts pursuant to a private Act, where each program for which a separate account is maintained complies with such requirements), Bermuda law permits complete freedom of investment management with regard to selection of asset classes.

7. Profile of a Prospective Program Participant

A prospective program participant will generally:
- be too small for, or not interested in, establishing and operating a wholly-owned captive for itself; and
- generate at least $750, 000 of annual premium onshore (be it a single-owner or association program of insurance). (Workers' compensation programs in California, which may be underwritten with less premium, are an exception to this)
- In the case of association programs (which are thought to account for about one third of total rent-a-captive premium income in the Bermuda market), association members are typically characterized by:
- similar exposures;
- a willingness to share risk within the mutual account;
- a combined loss ratio of 50% or less;
- a single or related exposure such as workers' compensation, general liability or automobile liability; and
- a consensus on the allocation of underwriting profit and investment income.

8. Does the Rent-a-Captive Itself Assume Risk?

Many of the rent-a-captives formed in Bermuda do not assume substantial risk in respect of the insurance programs of their program participants. Rather, these rent-a-captives view themselves as service companies and in fact require aggregate excess protection in some form as a condition of accepting a particular program. All financial agreements are typically backed up with letter of credit ultimately guaranteed and paid for by the program participant.
In recent years, the Registrar of Companies of Bermuda has made it clear that his office is prepared to consider applications to establish rent-a-captives which will accept

risk for their own account, subject always to meeting relevant solvency and liquidity requirements.3

1. 1995 Captive Insurance Company Reports.

2. 1986 Captive Insurance Company Reports.

3. The use of rent-a-captives can provide a number of business advantages. However, achieving the desired tax results requires careful tax planning. The above discussion is not intended to, and does not, constitute tax advice. Accordingly, readers should consult their own tax advisers for advice in relation to specific cases.

Captives & Reinsurance
What Is A Captive?

WHAT IS A CAPTIVE?
Originally a captive was a company created and controlled by either a parent company or professional association through which the parent or association could insure its own risks.

The concept has been broadened and expanded. It now includes not only the insurance of the parent or association, but in many cases, the insurance of those risks of other companies which can be controlled or directed by the parent or association.

Currently captives take the form of a Single Parent Captive, Association Captive, Group Captive and Rent-A-Captive.

SINGLE PARENT CAPTIVE
Is an Insurance or reinsurance company which is a wholly owned subsidiary formed primarily to insure the risks of its non-insurance parent or affiliates.

THE ASSOCIATION CAPTIVE
Is a company owned by a trade, industry, or service group for the benefit of its members.

THE GROUP CAPTIVE (Stock or Mutual)
Is a company jointly owned by a number of companies created to provide a vehicle to meet a common insurance need.

RENT-A-CAPTIVE
Where an owner of a captive offers to interested parties a division of the captive for a fee.

Where the captive is a reinsurance company, and by arrangement with a conventional insurance company, reinsures the risks of its parents or affiliates, the conventional insurance company is generally referred to as the "fronting" company.

Black, Davis & Shue Agency, Inc. has further broadened the concept by using a more conservative approach to captive insurance. We have joint ventured with insurance companies to form a partnership whereby a 50/50 quota share arrangement is used. Appropriate caps are applied thus protecting the captive so losses are properly managed.

CAPTIVE INSURANCE ARRANGEMENTS

Rent-a-Captives

A "rent-a-captive" is an alternative method of risk financing which brings tangible benefits to the insured including the following:
- Surplus funds accrue to the benefit of the insured.

- Lower cost risk financing for firms with low claims experience.

- Tax advantageous pre-funding of your own claims.

Special arrangements can be made for groups who are prepared to share risks, through the establishment of a group fund.

The Product

This is a specially designed method of risk financing enabling businesses or partnerships to achieve the benefits of captive insurance without the disadvantages of establishing their own captive. It is also a means of maintaining a certain amount of independence from the commercial market.

How does it work? Each policyholder purchases a policy. The premium is paid into a separate fund which is kept distinct from others and can only be used for purposes of meeting a claim under the policy. Each fund contributes its share of the administration costs and the administration costs relating to the policyholder's own insurance.

Special arrangements can be made for groups who are prepared to share risks, through the establishment of a group fund.

The Rationale

Many companies decide to, or are obligated to retain risk. Some have considered reserving a proportion of revenue each year to deal with claims as they arise. The main disadvantages of using this method are that tax relief is not

granted on the balance and the money cannot be used for other purposes.

Some companies have considered setting up their own captive. These have several advantages, including the following:

- Risk management

- Lower insurance premiums

- Premiums which reflect your own claims experience

- Ability to determine own policy conditions and scope of cover

- Smoothes out cash flow

- Access to reinsurance markets.

Whilst establishment of one's own captive market commercial sense for larger organizations, there are a number of drawbacks:

Cost

- Minimum first year costs will be about £35,000.

- Capitalisation requirement of £100,000 equity or letter of credit.

- 90% of profits to be remitted to the UK parent company to satisfy CFC rules.

- Running costs £30,000 per annum minimum.

Ownership

- For partnerships there can be difficulty over the ownership of surplus funds in the event of a split of the partners, leading to a winding up of the captive.

Time

- Business time is expended setting up and administering the captive.

Equity

- Difficulty of maintaining balance between policyholders.

KEY BENEFITS OF A 'RENT-A-CAPTIVE'

The disadvantages of a captive are extinguished or minimised with a rent-a-captive for the following reasons:

- No initial start up costs

- Control of Foreign Companies rules not applicable

- Fund can be discontinued without the need to wind up the captive

- Profit can be taken out on termination of cover

- Shared administration costs make the arrangement cost effective

- Flexibility, enabling potential new captive owners to test the water

Risk Management

The 'rent-a-captive' scheme also enables the company to focus upon loss control practices. The annual Fund Statement provides a management tool to monitor the results of risk control, evaluate the cost of poor procedures and hence introduce better audit controls.

TAX IMPLICATIONS

The motivation for using a rent-a-captive should always be insurance driven rather than tax driven. A rent-a-captive can be compared to a conventional insurance or an internal fund. Premiums paid to external insurers are usually tax-deductible.

In the UK, as in many other countries, reserves for future claims are not deductible. A reserve will only be allowable for Therefore the creation of an internal fund by a general provision will not generate a UK tax deduction. However, the payment of a premium to a captive, which itself creates a reserve, will provide tax relief to the premium paying company.

Any attack on profits by the Revenue would have to be:

- on the basis that the rent-a-captive was in fact controlled and managed in the UK; or

- that the premiums paid were not paid wholly and exclusively for the purposes of the practice's business and were therefore not deductible in calculating the practice profits; or

- under the anti-avoidance legislation contained in Section 739TA 1988 (Transfer of Assets Abroad).

CONTROLLED FOREIGN COMPANIES (CFC)

We do not consider that CFC legislation would be applicable to an offshore captive beneficially owned directly by a professional partnership, though it would be relevant if 20% or more of the captive's share capital were owned by, say, a UK resident service company owned by the partnership.

TARGET MARKET

Collegiate is suitable for professional businesses, e.g. legal (solicitors), architectural, accountancy, engineering, medical services, insurance company agencies, industry bodies or groups, and organisations with low claims records in relation to their premium expenditure.

The first year's premium is likely to be between £25,000 and £250,000, depending on the arrangements required.

Information Request Form
Select the items that apply, and then let us know how to contact you.

X Send product literature
_ Send company literature
_ Have a salesperson contact me
*Name*_____
*Title*_____
*Company*_____
*Address*_____
*E-mail*_____
*Phone*_____

APPENDIX E

SHAREHOLDER AGREEMENT

THIS AGREEMENT, made and entered into as of August 1, 1985 by and between MUTUAL INDEMNITY LTD. (formerly Aneco Mutual Ltd.), a company organized under the laws of the Islands of Bermuda (hereinafter "MUTUAL") and AMERICAN OWNER OPERATOR UNDERWRITERS, INC., a corporation organized and existing under the laws of the State of Delaware (hereinafter "SHAREHOLDER").

WITNESSETH:

WHEREAS, SHAREHOLDER is desirous of purchasing four hundred thirty-two thousand (432,000) non-voting preferred shares of MUTUAL designated Series "V4" preferred shares (hereinafter "PREFERRED SHARES") for the purchase price hereinafter set forth; and

WHEREAS, MUTUAL is desirous of repurchasing the PREFERRED SHARES at the close of business on the first day of January, 1991 for the purchase price hereinafter set forth; and

WHEREAS, MUTUAL has entered into a Reinsurance Agreement (the "TREATY") effective August 1, 1985 with Colonial Penn Insurance Company (hereinafter the "INSURANCE COMPANY") pursuant to which MUTUAL has reinsured certain of the liability of INSURANCE COMPANY on policies of insurance produced by SHAREHOLDER.

NOW, THEREFORE, in consideration of the mutual

promises and undertakings set forth herein the parties do hereby agree as follows:

1. SHAREHOLDER agrees to purchase the PREFERRED SHARES agrees to pay MUTUAL the amount of Four hundred thirty-two thousand dollars ($432,000.00) (herein the "Purchase Price"). This amount shall be payable by the delivery to MUTUAL within 30 days of the execution of this Agreement of a clean, irrevocable, unconditional letter of credit in the amount of four hundred thirty-two thousand dollars ($432,000.00) drawn upon a United States Bank approved by MUTUAL. Thereafter, SHAREHOLDER shall either continue to maintain the letter of credit so that at all times it remains in force or replace the letter of credit by paying MUTUAL four hundred thirty-two thousand dollars ($432,000.00) in cash prior to the expiration of the letter of credit.

2. Commencing on the first day of December, 1986 and annually thereafter on the first day of December of each succeeding year to and including December 1, 1990 (hereinafter the "DIVIDEND DATE") MUTUAL agrees to cause a dividend to be declared to the owner of record on such date of the PREFERRED SHARES in an amount equal to the sum of the following:

The amount of investment income, if any, earned by MUTUAL during the calendar year immediately preceding such DIVIDEND DATE resulting from the investment of the cash funds received by MUTUAL as the purchase price of the PREFERRED SHARES, if any, as set forth in paragraph (1) hereof, less an amount equal to one half per cent (1/2%) per annum of the average amount of investment funds held by MUTUAL as a result of the purchase price of the PREFERRED SHARES.

(B) Plus or minus the amount of investment income earned by MUTUAL in the calendar year preceding the DIVIDEND DATE, resulting from the investment of funds received by MUTUAL under the TREATY with INSURANCE COMPANY less an amount equal to one per cent (1%) per annum of the average amount of such funds held by MUTUAL during the preceding year. It is understood and agreed that such funds are held by MUTUAL as loss reserves and premium reserves and may be repaid to INSURANCE COMPANY pursuant to the terms of the TREATY.

(C) Plus or minus the amount of underwriting gain or loss realized by MUTUAL on the TREATY during the policy year preceding the DIVIDEND DATE. Underwriting gain shall be computed by the following formula:

Net premium received by MUTUAL after all deductions for expenses, taxes and other items; minus all losses incurred including losses incurred but not reported; minus two and one-half per cent (2.5%) of the original gross premium under the TREATY.

3. If on the Redemption Date, as defined in this Agreement, MUTUAL continues to hold funds pursuant to the TREATY with INSURANCE COMPANY, MUTUAL agrees to annually pay SHAREHOLDER as additional dividends the amount of investment income earned by MUTUAL during the preceding year resulting from the investment of such funds less an amount equal to one per cent (1%) of the average amount of such funds plus the amount of additional underwriting gain, if any, as defined in paragraph 2 (C) hereof until such time as the amount of funds held by MUTUAL is less than Five thousand dollars ($5,000.00) at which point liability under this paragraph shall cease.

4. On the first day of January, 1991 (hereinafter the "REDEMPTION DATE") MUTUAL agrees to repurchase from the SHAREHOLDER the PREFERRED SHARES upon presentation of the share certificate representing the PREFERRED SHARES duly endorsed for cancellation for the price of four hundred thirty-two thousand dollars ($432,000.00) minus the amount by which the cumulative sum of the amounts calculated under Sections 2(A), 2(B) and 2(C) of this Agreement is less than zero by reducing or returning the letter of credit or repaying the amount of cash paid by SHAREHOLDER at purchase price for the PREFERRED SHARES.

5. It is agreed that the PREFERRED SHARES issued to SHAREHOLDER pursuant to this Agreement are being purchased by the SHAREHOLDER for purposes of investment only. The said PREFERRED SHARES have not been registered under the United States Securities Act of 1933, as amended. The said PREFERRED SHARES shall not be sold, transferred, hypothecated, pledged or otherwise assigned or encumbered and will bear the following legend:-

> "These Securities have not been registered under the Securities Act of 1933, as amended. These Securities have been acquired for investment and may not be sold, transferred, hypothecated, pledged or otherwise assigned or encumbered."

6. This Agreement may not be modified, amended or changed in any manner except in a writing signed by all the parties hereto.

7. All notices, requests, demands or other communications provided for herein shall be in writing, shall be delivered by hand or by first-class mail, postage prepaid

and shall be addressed to the parties hereto at their respective addresses listed below or to such other persons or addresses as the relevant party shall designate as to itself from time to time in a writing delivered in like manner:

If to Mutual Indemnity Ltd., to it at:

Trimingham Building
Front Street
P.O. Box 1254
Hamilton 5, Bermuda

If to American Owners Operator Underwriters, Inc., to it at:

1655 Peachtree Street
Suite 520
Atlanta, Georgia 30309

8. This Agreement has been made and executed in the Islands of Bermuda and shall be governed by and construed in accordance with the laws of the Islands of Bermuda.

9. All amounts referred to herein are expressed in United States Dollars and all payments shall be made in such dollars.

10. The purchase of the PREFERRED SHARES by SHAREHOLDER is subject to the prior consent of the Bermuda Monetary Authority (Foreign Exchange Control) which agency must approve all transfers of securities in Bermuda companies.

IN WITNESS WHEREOF, the parties have set their hand,

At Atlanta, Georgia
Date: 11-22-85
AMERICAN OWNER OPERATOR UNDERWRITERS, INC.
By: s/ Chairman

At Hamilton, Bermuda
Date: 1 November 1985
MUTUAL INDEMNITY LTD.
By: s/ Robert A. Mulderig
Executive Vice President

APPENDIX F

AGENT AGREEMENT

THIS AGREEMENT IS MADE THIS 1st day of April 1985 by and between the Colonial Penn Insurance Company, an insurance corporation having its principal place of business at 5 Penn Center Plaza, Philadelphia, Pennsylvania (hereafter referred to as the "Company") and American Owner Operator Underwriters, Inc., having its principal place of business at 1655 Peachtree Street, Suite 520, Atlanta, GA 30309 (hereafter referred to as the "Agent").

FOR AND IN CONSIDERATION OF the mutual covenants and agreements contained herein, and intending to be legally bound hereby, the parties hereto agree as follows:

SECTION ONE

TERM OF AGREEMENT

This Agreement shall be effective as of April 1, 1985 and shall continue in full force and effect until terminated in accordance with the provisions of Section Twenty-Three. However, the Agent shall have no authority to bind risks hereunder until the effective date of the reinsurance treaties as set forth in the attached Addendum to this Agreement.

SECTION TWO

APPOINTMENT OF AGENT

A. The Company hereby nominates, constitutes and appoints the Agent as its legal representative and true and

lawful attorney to act in the Company's behalf in the procuring, underwriting and servicing of binders, policies, contracts, agreements, treaties, certificates and other written evidences of insurance or reinsurance including the handling and servicing of all claims, losses and suits resulting therefrom. This appointment shall apply only with respect to lines of property/casualty insurance business as set forth in the attached Addendum(s) to this Agreement.

B. Such authority shall be exercised only in accordance with the terms of this Agreement and such conditions and limitations as are from time to time established by the Company.

SECTION THREE

TERRITORY

A. The Agent shall have non-exclusive authority to operate in all states of the United States of America and the District of Columbia; subject to the applicable licensing authority of the Company. The Agent's authority will extend to risks located outside the United States of America and the District of Columbia if the coverage is written in conjunction with and is incidental to risks located within the aforementioned geographic areas; provided the extension of such coverage is not prohibited by the jurisdiction where such risk is located.

B. Either party shall have the right to conduct business for its own account without regard to this Agreement. Either party shall have the right to conduct business for its own account with any insurance or reinsurance entity or insurance or reinsurance intermediary.

SECTION FOUR

LIMITATIONS OF AUTHORITY OF AGENT

A. The Agent shall have no authority to waive any forfeiture, grant any permit, collect any premiums except for those policies which are subject to this Agreement, or bind the Company in any way except as herein expressly stated.

B. The Agent shall not commit the Company to any risk where the Company's gross aggregate per occurrence exposure exceeds the limits set down in the attached Addendum(s).

SECTION FIVE

GENERAL DUTIES OF COMPANY

The Company will:

A. Procure and maintain licenses and/or certificates of authority as an insurance company in such states as the Company shall deem necessary to the fulfillment of this Agreement.

SECTION SIX

GENERAL DUTIES OF AGENT

The Agent will

A. Make such filings, including filings of policy forms, rates and rules on behalf of the Company as are approved by the authorities of the states in which the Agent is operating for the Company.

B. Appoint such agents or representatives of the Company and make such agreements with them as the Agent deems desirable for the furtherance of this Agreement, subject always to the prior approval of the Company.

C. Supervise, direct and implement the production, underwriting, premium collection, accounting, statistical, and other work necessary or incidental to the insurance business written under this Agreement.

D. Procure and maintain Treaty and Facultative Reinsurance in terms and with companies acceptable to the Company.

E. Supervise, direct and implement the loss investigation, adjustment, settlement, compromise and subrogation functions, legal defense, and other work necessary or incidental therefor, including the payment of losses, for all claims arising out of insurance business written under this Agreement.

F. Set up and maintain such books and records in the manner and as required by the Company to record the transactions pursuant to this Agreement.

G. Compile and file with the Company such statistical information as is customarily completed by insurance companies for the business written hereunder.

H. Furnish, render and provide all services and facilities for the business it transacts, as are customarily furnished, rendered and provided by insurance companies for the business written hereunder.

I. Cancel policies, contracts or certificates for cause.

SECTION SEVEN
RECEIPT OF FUNDS: ACCOUNTS

A. Accounts of money due the Company on the business written by the Agent with the Company are to be rendered monthly so as to reach the Company not later than the twentieth (20th) day of the following month; the balance therein shown to be due the company shall be paid not later than sixty (60) days after the end of the month for which the account is rendered.

B. All premiums collected by the Agent are to be held in trust for the Company and are the property of the Company. The Agent has no interest in the premiums collected by it and shall make no deductions therefrom before paying the same to the Company except for the compensation authorized in Section Fifteen and amounts required to pay current losses and amounts required to pay reinsurers. The Agent shall not make personal use of such premium funds either in paying expenses of the Agent or otherwise. It is understood that interest accruing from the trust account inures solely for the benefit of the Agent.

C. If, at any time, the Agent determines that premiums on hand are not sufficient to pay current losses and the compensation authorized in Section Fifteen, the Agent may request a special remittance from the Company and the Company will make such remittance to the Agent within fifteen (15) days of the rendering of such a request, subject however to such verification from the Agent as is required by the Company.

D. The Agent shall report to the Company, in a form and manner acceptable to the Company, all insurance issued, accepted and/or bound pursuant to this Agreement.

E. Agent shall prepare and submit to the Company a report, not later than thirty (30) days after the close of each quarter, summarizing:

1. Paid losses.

2. Outstanding loss reserves (both reported losses and an estimate of incurred but not reported losses).

3. Allocated loss adjustment expenses paid.

4. Commissions paid.

SECTION EIGHT

BOOKS AND RECORDS

A. The Agent shall maintain true, accurate and complete records and accounts of all transactions arising out of this Agreement. Said records and accounts shall be maintained at all times in such a manner and form as may be agreed to by the Company and in accordance with generally accepted accounting and insurance practices.

B. It shall be the duty of the Agent, unless the Company relieves it of the same, to prepare and submit to the Company and the underwriting and statistical data applying to the business it does for Company's Annual Statement and other reports required of the Company by states, for business the Agent does for the Company.

C. All records and accounts or other documents relating to the business of the Company arising out of this Agreement are the property of the Agent and shall be subject at all reasonable times to inspection, duplication and/or audit

by a duly authorized representative of the Company, including representatives of regulatory agencies. In the event of termination of this Agreement, such records, accounts and documents will be made available to the Company for inspection and copying at the Agent's offices after termination. The Agent shall maintain such materials for a period of five (5) years after the date of termination of this Agreement.

D. All supplies furnished to the Agent by the Company shall remain the property of the Company and shall be returned to the Company upon termination of this Agreement.

E. The books and accounts of the Company shall be accepted as full and final evidence in all matters relating to this Agreement.

SECTION NINE

COMPLIANCE WITH REGULATION AND LAWS

A. In the conduct of business under this Agreement, the Agent will observe and comply with all rules and regulations of the Company now existing or hereafter promulgated and with all applicable laws, regulations and rulings by any governmental authority, agency, bureau or commission having jurisdiction. All binders and policies of insurance and reinsurance will be issued and delivered, and, when required, countersigned, pursuant to the applicable laws, regulations and rulings of any governmental authority, agency, bureau or commission. All agents or representatives of the Company appointed by the Agent shall be properly licensed as required by applicable laws and regulations. Any fine, fee or penalty assessed against the Agent by reason of

the Agent's action or failure to act hereunder shall be the responsibility of the Agent and the Agent will not be entitled to any reimbursement by the Company therefor.

B. In the conduct of business under this Agreement, the Company will observe and comply with all applicable laws, regulations and rulings by any governmental authority, agency, bureau or commission having jurisdiction. Any fine, fee or penalty assessed against the Company by reason of the Company's action or failure to act hereunder shall be the responsibility of the Company and the Company will not be entitled to any reimbursement by the Agent therefor.

C. The Agent shall, at its sole expense, provide for required countersignatures on policies written pursuant to this Agreement. Agent shall not bind the Company to any risk with regard to which the Company shall previously have notified the Agent in writing that such risk is excluded from the business hereunder. The Agent will cancel any risk forthwith, at the instruction of the Company.

SECTION TEN

ADVERTISING AND SOLICITATION MATERIALS

The Agent agrees that no pamphlets, booklets, advertising materials, or any other promotional materials relating to the Company shall be used, issued or circulated by it unless specifically authorized by the Company.

SECTION ELEVEN

CANCELLATION OF POLICIES

All policies written under this Agreement shall be

subject to cancellation by the Company on any anniversary date upon not less than thirty (30) days' prior written notice unless a longer period of time or special terms are required by law or have been specifically granted by the Company.

SECTION TWELVE

AGENT NOT TO INCUR INDEBTEDNESS

The Agent shall pay and discharge the expenses of conducting its own business and shall not incur any expenses chargeable to the Company, other than those authorized herein, without the Company's written approval.

SECTION THIRTEEN

ADJUSTMENT OF LOSSES

A. The Agent shall promptly notify the Company of any claim or loss arising out of business written pursuant to this Agreement which comes to its attention involving claims for punitive and/or exemplary damages or for which, in Agent's best judgment, the amount of damages recoverable is likely to exceed fifty thousand dollars ($50,000.00).

B. Agent shall have ultimate and full authority and control of all claims and losses arising out of the insurance contracts written pursuant to this Agreement, subject to Company's right to intercede and assume authority and control with respect to any claim when the Company deems it to be in its own best interest to assume such authority and control.

SECTION FOURTEEN

EXPENSES

A. The Agent shall incur, accept and pay all expenses in connection with the production, marketing and servicing of the insurance business, written under this Agreement, including but not limited to the following:

1. Printing of proposals, booklet certificates, solicitation brochures, premium notices, records and reports, and all documents and other materials required to fulfill the obligation of the Agent under this Agreement.

2. Promotional advertising and public relations expenses.

3. The Agent's general office expenses, including, but not limited to rent, salaries, utilities, transportation, furniture, fixtures, equipment, supplies, telephone, postage and other general overhead expenses.

B. The Company shall not be responsible for any fees or expenses incurred by the Agent, its employees, agents or brokers to obtain or maintain licenses required to perform activities relating to this Agreement.

SECTION FIFTEEN

COMPENSATION

Subject to compliance by the Agent with the terms and conditions of this Agreement, the Company will allow Agent the following as full compensation for all services rendered and expenses incurred by Agent.

A. An amount equal to a percentage of the Gross Written Premium specified in the attached Addendum(s) on the business coming under this Agreement. Gross Written Premium shall include adjustments for termination of policies and for increases and decreases in policy premiums.

B. Amounts necessary to reimburse the Agent for allocated claims costs arising from the investigating, adjusting, settling, compromising and subrogating claims.

SECTION SIXTEEN

COMMISSION REFUNDS

Commissions paid to the Agent on cancelled policies, reduced premiums and uncollected premiums shall be refunded to the Company at the same rates at which such commissions were originally earned by the Agent.

SECTION SEVENTEEN

OFFSET AGAINST COMPENSATION

The Agent shall not be entitled to any compensation for services of any kind rendered to or on behalf of the Company except as described in this Agreement. The Company may offset against said compensation any claims made by it against the Agent arising out of this Agreement or any other contracts by and between the parties hereto or between Agent and any of the Company's affiliates or subsidiaries.

SECTION EIGHTEEN

LAWS GOVERNING

This Agreement, including the provisions relating to arbitration, shall be governed by the laws of the State of Pennsylvania.

SECTION NINETEEN

ERRORS & OMISSIONS

A. Agent shall, at all times during this Agreement, maintain an Errors and Omissions Policy and separate Fidelity Policy on all of its employees providing a minimum of $1,000,000.00 coverage.

B. Inadvertent delays, errors and/or omissions made in connection with this Agreement shall not relieve either party from any liability which would have attached had such delays, errors or omissions not occurred; provided that such delays, errors or omissions shall be rectified as soon as possible after discovery.

SECTION TWENTY

ARBITRATION

A. Any controversy or claim between the parties hereto arising out of or relating to this Agreement, or the breach of the same, shall be settled by arbitration to be held in Pennsylvania. Each party shall choose one arbitrator, and the two arbitrators shall then mutually agree on a third arbitrator. The arbitrators shall hold a hearing and render an award in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by a majority of the arbitrators may be entered in any court having jurisdiction. The arbitrators shall be required to decide matters submitted to them upon the custom

and usage of the business in a spirit of equity rather than of technicalities or of legal requirements.

B. All arbitration expenses shall be borne equally by the Company and the Agent.

SECTION TWENTY-ONE

AGENT TO ACT AS INDEPENDENT CONTRACTOR

The Agent shall be and act as an independent contractor. Nothing contained herein shall be construed to create the relationship of employer and employee between the Company and the Agent.

SECTION TWENTY-TWO

INDEMNIFICATION

A. Agent agrees to indemnify, defend and hold the Company harmless from and against any and all claims, suits, actions, liability, loss, expense or damage (including compensatory and punitive or exemplary damages), which the Company, its affiliates, directors, officers, agents, or employees, may sustain, due to or arising out of any act by Agent, its affiliates, directors, offices, agents, representatives, or employees provided that the Company has not contributed to or compounded such act.

B. The Company agrees to indemnify, defend and hold Agent harmless from and against any and all claims, suits, liability, loss, expense or damages (including compensatory and punitive or exemplary damages) which Agent its affiliates, directors, officers, agents or employees may sustain, due to or arising out of any act by the Company,

its affiliates, directors, officers, agents, representatives, or employees provided that Agent has not contributed to or compounded such act.

C. In no event does the Company agree to indemnify and hold the Agent harmless for the actions of brokers or of the Agent or its employees or agents.

SECTION TWENTY-THREE

TERMINATION

A. This Agreement may be terminated at any time by the mutual agreement of the parties.

B. Except as otherwise provided herein, this Agreement may be terminated for any reason by the giving of not less than ninety (90) days notice in writing by either party to the other unless a shorter period is agreed to by the parties in writing.

C. Termination in whole or in part of reinsurance of the Company on business covered by this Agreement shall result in the suspension of all authority granted to the Agent under this Agreement to assume business on behalf of the Company. This suspension of authority shall be effective the same date as effective for the termination of reinsurance and shall remain in effect until such reinsurance is again in effect in accordance with Section Six, paragraph D.

D. This Agreement shall terminate automatically without notice in the event of the bankruptcy, insolvency, receivership, liquidation or assignment for the benefit of creditors by either party or if there is any material change in the ownership or control of the other party.

E. In the event of default in any material term of this Agreement, the non-defaulting party shall give notice of such default to the defaulting party and this Agreement shall terminate thirty (30) days after the date of such notice unless the defaulting party has remedied such default prior to the end of the thirty (30) day period.

F. This Agreement may be terminated by the Company at any time if the Company determines that any law or regulation of a federal, state or local government has rendered this Agreement illegal; but only insofar as this Agreement applies to such jurisdiction.

G. Upon termination of this Agreement, no charges shall be made by the Agent for services in settlement of accounts or winding up of affairs between the Company and the Agent.

H. If this Agreement is terminated, neither party shall have any claim against the other for loss of prospective profits or fees or damage to business arising therefrom.

I. In the event of termination of this Agreement, any business written hereunder and remaining with the Company shall be permitted to continue to normal expiration, or in the case of continuous policies, to the next anniversary date; provided, however, that if the renewal date of any annual policy shall occur within a period of ninety (90) days after the date of termination of this Agreement, and such renewal shall have had renewal terms already committed, such policy shall be renewed and permitted to continue in force until its next annual renewal date.

J. In the event of termination of this Agreement:

1. The Agent shall promptly cease all solicitation activities provided for hereunder.

2. The administration obligations of the Agent to the Company including, but not limited to, policy servicing claims handling, record keeping and reporting functions, specified in this Agreement shall survive and shall continue to be discharged promptly by the Agent until all legal and/or regulatory obligations of the Company under or in connection with insurance business written pursuant to this Agreement have terminated and all applicable claims have been paid.

3. Upon termination of this Agreement and subject to the provisions of Section Twenty-Three J., 4., below, Agent shall be the owner of all insurance expirations as that term is used and understood in the industry and all records and other documents relating to the business of the Agent are the property of the Agent and shall be left in the Agent's possession, and the Company's record or knowledge of names of insured and expiration dates shall not be disclosed by the Company to any agent, broker or other person unless required by law, nor used by the Company for any purpose which shall abridge the Agent's rights of ownership, use and control.

4. Should the agent fail to properly account for and pay all premiums due to the Company for which the Agent is liable, or should the Agent breach any other material term or provision of this Agreement, the use and control of all expirations including the right,

title and interest in and to the records thereof shall be vested in the Company.

SECTION TWENTY-FOUR

LEGAL ACTION

The Agent shall not take legal action in connection with any matter pertaining to the business of the Company without the written consent of the Company. The Agent shall promptly notify the Company of any legal action or threat of legal action involving the Company with respect to any matters which are the subject of this Agreement.

SECTION TWENTY-FIVE

PRIVACY

Pursuant to the provisions of the Insurance Information and Privacy Protection Act, as enacted in various states, the Agent recognizes that, in the performance of its obligations under this Agreement, the Company may disclose personal or privileged information about individuals collected or received in connection with insurance transactions. Since the disclosure of such information is protected by law, Agent agrees that it will not redisclose such information without the individual's written authorization, unless such disclosure is permitted by law.

SECTION TWENTY-SIX

NOTICES

To be validly given, all notices, requests, consents and other communications by either party, arising out of this

Agreement, must be in writing and mailed by first-class mail postage-paid, to the last known address of the party.

SECTION TWENTY-SEVEN

CURRENCY

All amounts due to either party hereunder shall be payable in United States currency.

SECTION TWENTY-EIGHT

ASSIGNMENT

This Agreement shall not inure to the benefit of any successor-in-interest of the Agent nor may any interest under this Agreement be assigned by the Agent without the prior written consent of the Company.

SECTION TWENTY-NINE

HEADINGS

Headings or titles to the several Articles herein are for identification purposes only and shall not be construed as forming a part hereof.

SECTION THIRTY

MODIFICATION

This Agreement may only be revised or modified in a writing that is accepted by both the Company and the Agent. No other change, modification, addition or deletion to any portion of this Agreement will be valid or binding upon either

the Company or the Agent. Neither a representative of the Company nor the Agent has authority to waive any of the provisions of this Agreement or to modify or change any of its terms and conditions, except as provided herein.

SECTION THIRTY ONE

EXECUTION

This Agreement shall not go into force until duly executed on behalf of the Agent and the Company.

IN WITNESS WHEREOF, the parties have set their hands this 1st day of April, 1985.

COLONIAL PENN INSURANCE COMPANY
BY: S/ Title: Sr. Vice President
ATTEST: S/Title: Vice President
AMERICAN OWNER OPERATOR
UNDERWRITERS, INC.
BY: S/ Title: President
ATTEST: s/ Title:

ADDENDUM NUMBER ONE

This Addendum, by consent of the parties, becomes a part of and is subject to the Agent Agreement between the parties, effective April, 1985, and this Addendum is effective April 1, 1985.

CROSS COMMISSIONS ALLOWED AGENT (New & Renewal)	LIFE OF INSURANCE	CROSS BINDING AUTHORITY
*57.5%	Fuel Tax & Related Bonds	10,000 Any One Bond

*2.5% Overwrite, payable by Agent to Submit Intermediaries, Inc.

Gross binding authority limits may be exceeded by Agent only when Agent procures reinsurance acceptable to Company, limiting Company's exposure to the foregoing of the total amount insured.

WITNESS WHEREIN the acceptance of this Addendum and its terms by the signature herein:

COLONIAL PENN INSURANCE COMPANY
BY: S/ Title: Sr. Vice President
ATTEST: s/ Title: Vice President
AMERICAN OWNER OPERATOR
UNDERWRITERS, INC.
BY: S/ Title: President
ATTEST: S/ Title: Secretary

This Addendum, by consent of the parties, becomes a part of and is subject to the Agent Agreement between the parties, effective April, 1985, and this Addendum is effective August 1, 1985.

GROSS COMMISSIONS ALLOWED AGENT	LINE OF INSURANCE	GROSS BUILDING AUTHORITY
20% of Net Written Premium (both new and renewal)	Physical Damage & Cargo on long-haul trucking	$215,000 per occurrence per unit

Net Written Premium is defined to be Gross Written less cancellations and refunds.

CONTINGENT COMMISSION

The agent can also earn additional commissions to a maximum of 5% of net written premiums during any contract year. The contingent commission is to be calculated and paid by the company ninety days after the expiration of the first year following the expiring date of the contract year in question and to be adjusted annually, thereafter as required. The first contract year will run from August 1, 1985 to July 31, 1986.

In the event that the contingent commission on any contract year shows a debit balance to the company, then the amount of the debit balance will be carried forward to the next contingent commission calculation and to the statements for the succeeding contract year and/or years.

No contingent commission shall be paid with respect to any

contract year if the profit commission calculations and statement show a debit balance to the company.

The contingent commission calculation will be calculated on the following basis:

A. Income

1. 0.685 of net premiums written during the contract period less any facultative premiums written during the contract period.

B. Outgo

1. Loss and Loss Expense paid less any salvage or recoveries.

2. Estimated reserve for lossess outstanding for the contract year in question at the date the statement is prepared.

3. Any deficit balance from previous contract year(s).

4. Premium paid for aggregate stop loss insurance.

5. Premium paid for semi-automatic facultative reinsurance in excess of 2.5%; any refund will be credited.

6. Assessments made to the company by any residual market mechanism or from Assigned Risk charges to the company arising out of the premiums written on this contract.

7. Any monies due from reinsurers which has not been collected.

IN WITNESS WHEREOF the parties here hereto set their hands and seals_____day of _____19__.

ATTEST

COLONIAL PENN INSURANCE COMPANY

_____ _____

ATTEST

AMERICAN OWNER/OPERATOR UNDERWRITERS, INC.

_____

BY _s/ Richard D. Slautterback

APPENDIX G

This Agreement made by and between Colonial Penn Insurance Company, Philadelphia, PA., hereinafter referred to as the Company ("COMPANY"), and Mutual Indemnity Ltd. of Hamilton, Bermuda, hereinafter referred as the Reinsurer ("REINSURER").

In consideration of the payment of the reinsurance premium, and subject to the terms, conditions and limits of liability set forth below, the Reinsurer does hereby reinsure the Company in respect of the Company's Policy.

If the Company is constituted of more than one corporation, whose names are set forth above, this Agreement shall apply severally as between the Reinsurer and each such corporation with respect to the policy or policies issued by each such corporation. The rights and obligations provided for herein of any one corporation constituting the Company will not be held, assumed or guaranteed by any other corporation constituting the company.

ARTICLE I

For purposes of this Agreement, the following terms shall have these meanings:

1. "Policy" - Various Company policies and any binders extensions or renewals thereof and endorsements for alterations thereto issued by the Company's managing general agent, American Owner Operator Underwriters, Inc. pursuant to an agency agreement dated the 1st day of April, 1985 (hereinafter "AGENCY AGREEMENT").

2. "Incurred Losses" - All Paid Losses, plus cash reserves for unpaid losses under the Policy as estimated by the Company.

3. "Paid Losses" - Claims under the Policy paid by the Company, plus all Allocated Claims Expense paid by the Company in connection with the Policy, whether or not

related to claims paid plus the amount of the Company's loss incurred by reason of the Company regulatory programs which results from the Company writing the premium which is the subject of this Agreement.

4. "Allocated Claims Expense" - Such claims expenses that the Company, under its accounting practices, directly allocates to a particular claim. Such expenses include, but are not limited to attorneys's fees for claims in suit, court costs and related costs such as filing fees, and the costs of medical examination, expert medical or other testimony, laboratory services and x-rays, autopsies, stenographic services, witnesses and summonses and copies of documents; but shall not include the salaries and travelling expenses of the Company's employees or the Company's overhead.

5. "Net Premium Paid" - The earned premium paid to the reinsurer after all deductions by the Company plus the amount of additional premium paid to the reinsurer (after all deductions) minus the return premium paid by the reinsurer to the Company.

6. Other terms used in this agreement shall have the definition first appearing in the Insurance Code of the State of California, the NAIC *Examiners Handbook*, NAIC *Accounting Practices and Procedures Manual for Fire and Casualty Insurance Companies* or the Reinsurance and the Reinsurance Association of America *Glossary of Reinsurance Terms*.

ARTICLE II

The Reinsurer will be liable to the Company under this Agreement for the following:

1. Ninety percent (90%) of the first fifty thousand dollars ($50,000) of Incurred Losses arising out of each Auto Physical Damage occurrence as defined in the policy, plus all related Allocated Claims Expense;

Nowithstanding the above, or any other provision of this

Agreement, the Reinsurer's *maximum liability is limited to ninety percent (90%) of seventy percent (70%) of the original cross earned premium minus all amounts paid by the Company as contingent commissions pursuant to AGENCY AGREEMENT.*

ARTICLE III

This Agreement shall take effect as of 12:01 a.m. Standard Time on August 1, 1985 at the place of the issuance of the policies and will not be terminated as long as the Policies mentioned in this Agreement remain in force except in accordance with Article X hereof.

Reinsurer recognizes that the Company's obligations which accrue during the term of the Policy will survive the termination of the Policy; and the Reinsurer's obligations under this Agreement will correspondingly survive the termination of the Policy and the termination of this Agreement. If this Agreement terminates, the Reinsurer's liability under ARTICLE II hereof will continue with respect to risks attaching prior to the effective date of termination of this Agreement, and the Reinsurer will pay the Company for Paid Losses, and short term cancellation penalty if applicable, and allocated claims expense until there are no more Incurred Losses outstanding; unless the Company and reinsurer agree at mutual terms to discontinue any liability hereunder.

ARTICLE IV

1. While the Reinsurer does not undertake to investigate or defend claims or suits under the Policy, it shall where permitted by law, have the right and opportunity to associate at its own expense, with the Company and its representatives in the defense of any claim, suit or proceeding involving this reinsurance. Except as otherwise specifically provided for herein, the

liability shall follow that of the Company under the Policy. All settlements by the Company of claims involving this reinsurance, when made by the Company shall be unconditionally binding on the Reinsurer.

2. The Company shall, at the request of the Reinsurer, furnish the Reinsurer a copy of the Policy and all endorsements thereto which in any manner affect this Agreement and shall make available for inspection and place at the disposal of the Reinsurer at reasonable times any of its records relating to this reinsurance or claims in connection therewith.
3. The Company will pay or credit the Reinsurer up to the amount of the reinsurer's interest for amounts attributable to salvage, reimbursement obtained or recovery made by the Company relating to the Policy, after deducting the actual cost (excluding Company salaries and office expenses) of obtaining such salvage or reimbursement of making such recovery, and after the company has been reimbursed up to the amount of its interest.

ARTICLE V

1. The Company will, with funds to be provided by the Reinsurer, establish and maintain a Paid Loss Deposit Fund, the purpose of which is to provide a source of funds for payment of Reinsurer's liability under this Agreement. The initially required level of the Paid Loss Deposit Fund shall be $50,000. The Company and Reinsurer agree if necessary to adjust the required level of the Paid Loss Deposit and Fund six (6) months after the effective date of this Agreement and quarterly thereafter.
2. If, during any calendar month following the effective date of this Agreement, the Company becomes obligated to pay amounts representing the Reinsurer's liability under this Agreement that exceed the then-current initially

or adjusted required level of the Paid Loss Deposit Fund, the Reinsurer shall within fourteen (14) Calendar days after receipt of a written demand by the Company, forward funds to the Company sufficient to cover such amounts greater than the Paid Loss Deposit Fund balance. The Reinsurer will be credited for the forwarding of such funds (less any interest paid) in a subsequent Reconciliation Statement.

ARTICLE VI

1. The consideration for the reinsurance provided hereunder will be a reinsurance premium which shall be ninety percent (90%) of the gross original earned premium under the Policy after deducting all premiums paid for facultative reinsurance minus ninety percent (90%) of the expenses set forth in Addendum 1 hereto.:
2. Whereas the premium is received by the Company in accordance with the terms and conditions of the Policy, reinsurance premium shall be payable to the Reinsurer within the time specified in ARTICLE VII below. The amounts owed by the parties to each other shall be reconciled as provided in paragraph 3 immediately below.
3. The reinsurance premium payable to the Reinsurer shall be reconciled against the following items to the extent that such items were not previously reconciled under this Agreement:
   a) the amount of the initially required level of the Paid Loss Deposit Fund;
   b) the amount necessary to establish or maintain any adjusted required level of the Paid Loss Deposit Fund; and
   c) that portion of the Reinsurer's liability under ARTICLE II of this Agreement represented by Paid Losses.

4. The Company shall not cede more than ten million eight hundred thousand dollars $10, 800, 000 of original gross premiums under this Agreement

ARTICLE VII

1. Within ten (10) days after each payment of premium is due to the Company in accordance with the terms and conditions of the Agency Agreement, the Company will issue to the Reinsurer a Reconciliation Statement reflecting items a, b, and c described in ARTICLE VI, 3 above. If the result of any such reconciliation is that the Reinsurer owes money to the Company, the Reinsurer will pay the amount so owed within the time required by this Agreement or if not otherwise specified, within 10 days after receipt of the Reconciliation Statement. If the result of any such reconciliation is that the Company owes money to the Reinsurer, the Company will pay the amount so owed at the time the Reconciliation Statement is issued. All payments hereunder shall be made in United States currency.
2. The parties hereto recognize and agree that the Reinsurer's liability hereunder will probably extend beyond the time that the Company is receiving premiums under the Policy, and possibly beyond the expiration date of the Policy and this Agreement, and that in such an event the reconciliations may involve only computation of the Reinsurer's liability to the Company, if any.

ARTICLE VIII

On request by the Company, and as security for the amount of the reinsurer's liability in respect of unearned premiums and outstanding loss reserves the reinsurer shall furnish to the Company a clean unconditional, irrevocable letter of credit or trust agreement in an amount and in such form as

shall be required by the Company or, in the alternative, with the Company's consent, a surety bond may be provided in an amount and on such forms as the Company reasonably require. Such letter of credit or surety bond shall not be required for an amount in excess of 125% of the total of the unearned premium reserves and outstanding loss reserves on business ceded under this agreement. Such letter of credit or surety bond must be issued by a bank or surety company chartered in the United States and acceptable to the Company, at its sole discretion.

The Company shall have the right to draw on the letter of credit in the event that a renewal letter of credit is not received by the Company at least 30 days prior to expiration. Nothing contained herein shall prohibit the Company from requiring the reinsurer to deposit an agreed-upon sum of money with the Company on the effective date of this Agreement, to establish such initial reserves.

In no event shall the Reinsurer be required to provide a letter credit or other security in an amount greater than its then maximum liability to the Company.

ARTICLE IX

1. As a condition precedent to any right of action hereunder, any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration composed of two (2) arbitrators and an umpire, meeting in Philadelphia, Pa. unless otherwise agreed by the Company and the Reinsurer.
2. The members of the board of arbitration shall be active or retired disinterested officials of insurance or reinsurance companies. Each party shall appoint its arbitrator and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within sixty (60) days after being

requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire within four (4) weeks after their nomination, each of them shall name three (3), of whom the other shall decline two (2) and the decision shall be made by drawing lots.

3. The Claimant shall submit its initial brief within twenty (20) days from appointment of the umpire. The respondent shall submit its brief within twenty (20) days thereafter and the claimant may submit a reply brief within ten(10) days after filing of the respondent's brief.
4. The board shall make an award with regard to the custom and usage of the insurance business. The board shall issue its award in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross examination and rebuttal shall be allowed. The board shall make its award within sixty (60) days following the termination of the hearing unless the parties consent to an extension. A decision by the majority of the members of the board shall become the award of the board and shall be final and binding upon all parties to the proceeding.
5. If more than one (1) reinsurer is involved in the same dispute all such reinsurers shall constitute and act as one (1) party for purposes of this clause and communications shall be made by Company to each of the reinsurers constituting the one (1) party; provided, however, that nothing therein shall impair the rights of such reinsurers to assert several, rather than joint, defenses or claims, nor be construed as changing the liability of the reinsurers under the terms of this Agreement from several to joint.
6. Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of the arbitration proceedings shall be allocated by the board.

ARTICLE X

This Agreement may be cancelled in whole or in part by either party giving ninety (90) days prior written notice to the other party. The reinsurer shall have the right to cancel this Agreement by giving a number of days prior written notice to the Company which shall be not less than ninety (90) days more than the longest prior notice of cancellation required by any named Insured or insured under the Policy.

ARTICLE XI

1. Inadvertent delays, errors or omissions made by the Company or Reinsurer in connection with this Agreement or any transaction hereunder shall not relieve the other party from any liability which would have attached, had such delay, error or omission not occurred, provided that such error will be rectified as soon as possible after discovery.
2. In the event of the failure of Reinsurers hereon to pay any amount claims to be due hereunder, Reinsurers hereon, at the request of the Company, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction; and all matters arising hereunder shall be determined in accordance with the law and practice of such Court. Service of process in such suit may be made upon Tucker, Gellman and Mulderig, PC, 285 Madison Avenue, New York, N.Y. 10017 and in any suit instituted against any one of them upon this Contract, Reinsurers will abide by the final decision of such Court or of any Appellate Court in the event of an appeal. The above-named are authorized and directed to accept service of process on behalf of Reinsurers in any such suit and/or upon the request of the Reassured to give a written undertaking to the Reassured

that they will enter a general appearance upon Reinsurers' behalf in the event such suit shall be instituted. Further, pursuant to any statute of any State, Territory, or District of the United States which makes provision Commissioner, or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit, or proceeding instituted by or on behalf of the Reassured or any beneficiary hereunderarising out of this Contract and hereby designate the above-named Tucker, Gellman and Mulderig, P.C., as the firm to whom the said officer is authorized to mail such process or a true copy thereof.

ARTICLE XII

The Reinsurer hereby agrees that, as to all reinsurance made, ceded renewed or otherwise becoming effective hereunder, the reinsurance shall be payable by the Reinsurer on the basis of the liability of Company under the Policy without diminution because of the insolvency of Company.

It is further agreed and understood that in the event of insolvency of the Company, the liquidators or receivers or statutory successor of Company shall give written notice to the Reinsurer of the pendency of any claim against the insolvent Company under the Policy within a reasonable time after such claim is filed in the insolvency proceedings; that during the pendency of any such claim the Reinsurer may investigate and interpose, at its own expense, in the proceeding where any such claim is to be adjudicated any defense or defenses which it may deem available to the Company or its liquidator or receiver or statutory successor; that the expense thus incurred by the Reinsurers as the assuming insurer shall be chargeable subject to court approval against the insolvent Company as part of the

expense of liquidation to the extent of a proportionate share of the benefit which may accrue to Company solely as a result of the defense undertaken by the Reinsurer as the assuming insurer.

It is further agreed and understood that as to all reinsurance made, ceded, renewed or otherwise becoming effective hereunder, the reinsurance shall be payable by the reinsurer to Company or to its liquidator or receiver or statutory successor, except (a) where the contract specifically provides another payee or such reinsurance in the event to the insolvency of Company, or (b) where the Reinsurer with the consent of the direct insured has assumed obligations of Company under the policy as direct obligations of the Reinsurer to the payees under the Policy and in substitution for the obligation of Company to such payees.

ARTICLE XIII

1. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.
2. This Agreement may not be released, discharged, changed or modified except by an instrument in writing by a duly authorized representative of both of the parties.
3. Any notices, requests or other communications hereunder will be in writing and addressed as follows:

If to the Reinsurer, then to:
Mutual Indemnity Ltd.
Trimingham Building
Front Street
P. O. Box 1254
Hamilton 5, Bermuda
If to the Company, then to:
Colonial Penn Insurance Company
Five Penn Center Plaza
Philadelphia, Pa. 19181

IN WITNESS WHEREOF the parties by their duly authorized officers have signed this Agreement at Hamilton, Bermuda this 16th day of August, 1985.

MUTUAL INDEMNITY LTD.
S/
Robert A. Mulderig
Executive Vice President

At Philadelphia, Pa. this 3rd day of December, 1985.

COLONIAL PENN INSURANCE COMPANY
S/

ADDENDUM NO. 1

TO A REINSURANCE AGREEMENT EFFECTIVE AUGUST 1, 1985

Between

COLONIAL PENN INSURANCE COMPANY

and

MUTUAL INDEMNITY LTD.

Policy Issuing Fee:	5% of Premiums
Commissions:	20% of Premiums
Excess Reinsurance Premium:	2.5% of Premiums
State Premium Tax:	3% of Premium
Federal Excise Tax:	1% of Premium
Contingent Commission:	Up to 5% of Premiums As per the Agency Agreement

IN WITNESS WHEREOF the parties by their duly authorized officers have signed this Agreement this 16th day of August, 1985.

MUTUAL INDEMNITY LTD.	COLONIAL PENN INSURANCE COMPANY
S/ Robert A. Muldrig Executive Vice President	S/

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD D. SLAUTTERBACK, SANDRA L. SLAUTTERBACK, TRUSTEE, AMERICAN OWNER OPERATOR UNDERWRITERS, INC., and AMERICAN TRUCK UNDERWRITERS HOLDING CORPORATION,
Appellants,

vs.
IPC MUTUAL INDEMNITY, LIMITED,
Appellee

DOCKET NO. 97-8050
DC Docket No. 94-03402-CV-JEC

MOTION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Cynthia G. Weaver
Attorney for Appellants
Georgia Bar No. 743129
9 East Church Street
Elberton, Georgia
Tel: (706) 213-1990
Fax: (706) 213-1977

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

330 Mad. Parent Corp. (Leucadia subsidiary, sister co. Colonial Penn)
AIC Financial Corp. (Leucadia subsidiary, sister co. Colonial Penn)
Allcity Insurance Co. (Leucadia subsidiary, sister co. Colonial Penn)
American Life & Casualty Insurance Co. (Conseco subsidiary, sister company of Colonial Penn)
American Life & Casualty Insurance Co. (Conseco subsidiary, sister company of Colonial Penn)
American Life Holding Co. (Conseco subsidiary, sister company of Colonial Penn)
Americanm Travelers Insurance Company of N.Y. (Conseco subsidiary, sister co. of Colonial Penn)
American Truck Underwriters, Inc.
American Owner Operator Underwriters, Inc., Appellant
American Truck Underwriters Holding Corporation, Inc., Appellant
American Investment Co. (Leucadia subsidiary, sister co. of Colonial Penn)
American Life Holdings, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
American Investment Financial (Leucadia Subsidiary, sister co. of Colonial Penn)
Ameican Life & Casualty Marketing Division Co. (Conseco subsidiary, sister co. of Colonial Penn)
American Investment Bank, N.A. (Leucadia subsidiary, sister co. of Colonial Penn)
American Travellers Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Baldwin Forest Products L.L.C. (Leucadia subsidiary, sister co. of Colonial Penn)
Baldwin Enterprises, Inc.(Leucadia subsidiary, sister co. of

Colonial Penn)
Baldwin-CIS L.L.C.(Leucadia subsidiary, sister co. of Colonial Penn).
Bankers Life & Casualty (Conseco Subsidiary, sister co. of Colonial Penn)
Bankers National Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Bankers Life Insurance Company of Illinois (Conseco subsidiary, sister co. of Colonial Penn)
Bankers Life & Casualty Co. (Conseco subsidiary, isster co. of Colonial Penn)
Bay Colony Insurance Co. (Leucadia subsidiary, sister co. of Colonial Penn)
Bellpet, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Beneficial Standar Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Burke, Paul W., Attorney for Appellee
Caja de Aharro y Seguro S.A. (Leucadia Affiliate)
Capital Management, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Carnes, Hon. Julie, U.S. District Judge
Centurion Insurance Co. (Leucardia subsidiary, sister co. of Colonial penn)
Certificed Life Insurance (Conseco subsidiary, sister co. of Colonial Penn)
Certified Life Insurance (Conseco subsidiary, sister co. of Colonial Penn)
CFM Insurance Managers (Bermuda)(Mutual Indemnity sister company)
Charter national Life Ins. Co., (Leucadia subsidiary, sister co. of Colonial Penn)
CIHC, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
CNC Entertainement Nevada, Inc. (Conseco subsidiary, sister co. of Colonial Penn)

College Life Dvelopment Corp. (Leucadia subsidiary, sister co. of Colonial Penn)
Colonial Penn Group, Inc.
Colonial Penn Insurance Company
Colonial Penn Franklin Insurance Company
Commercial Loan Insurance Corp. (Leucadia subsidiary, sister co. of Colonial Penn)
Commonwealth Risk Services (Europe) Limited (United Kingdom)
Commonwealth Risk Services, Inc. (Pennsylvania)
Commonwealth Risk Services (West) Ltd. (California)
Conseco Risk Management, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Entertainment, LLC (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Financial Services, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Services, L.L.C. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Entertainment, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Equity Sales, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Global Investments, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Marketing, L.L.C. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Mortgage Capital, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Conseco Inc.(acquiring Colonial Penn from Leucadia National Corp.)
Conseco Private Capital Group, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Continental Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)

Conwed Corp. (leucadia subsidiary, sister co. of Colonial Penn)
CPAX, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
CPI Investments, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Drew, Eckl & Farnham, Attorneys for Appellee
Empire Insurance Group (Leucadia subsidiary, sister co. of Colonial Penn)
Empire Insurance Co. (leucadia subsidiary, sister co. of Colonial Penn)
Farnham, Clayton, Attorney for Appellee
Florida Power & Light Company (Former owner of Colonial Penn)
FPL Group, Inc. (Former owner of COlonial Penn)
Free, Benjamin, Former Attorney for Appellant
Great American Reserve insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Hamilton Management Ltd. (Wisconsin)
HJF International (Bermuda)
HSD Venture (Leucadia subsidiary, sister co. of Colonial Penn)
Intramerica Life Insurance Co. (sister company of Colonial Penn)
Intramerica Life Insurance Co. (sister company of Colonial Penn)
IPC Group of America, Lt. (Pennsylvania)
IPC Mutual Holdings Ltd. (Delaware)
IPC Mutual Indemnity, Limited, Appellee
Jefferson National Life Insurance Company of Texas (Conseco subsidiary, sister co. of Colonial Penn)
Lamar Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Legion Management Corporation (Oklahoma)
Legion Finance Corporation (Missouri)

Legion Insurance Company (Pennsylvania)
Leucadia National Corporation (parent company of Colonial Penn)
Life Partners Group, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Lincoln American Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
LNC Investments, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Lomas Financial Corp. (Conseco subsidiary, sister co. of Colonial Penn)
M & A Holdings, Ltd. (Bermuda)
Marketing Distribution Systems Consulting Group, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Massachusetts General life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
MRM Reinsurance Brokers (Vermont) Ltd. (Vermont)
Mutual Risk Management (Bermuda) Ltd.
Mutual Indemnity Lt. (Bermuda)
Mutual Indemnity (Barbados) Ltd.(Barbados)
Mutual Risk Management (Cayman), Ltd. (Cayman)
Mutual Risk management Ltd.
Mutual Risk management (Barbados) Ltd. (Barbados)
Mutual Finance, Ltd. (Bermuda)
Mutual Group, Ltd (Delaware)
Mutual Indemnity (Bermuda) Ltd. (Bermuda)
National Fidelity Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Neward Corp.(Leucadia subsidiary, sister co. of Colonial Penn)
NASC, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Park International Limited (bermuda)
Pennpark Investors, L.L.C. (Leucadia subsidiary, sister co. of Colonial Penn)
Philadelphia Life Insurance Co. (Conseco subsidiary, sister

co. of Colonial Penn)
Philcorp, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Premium Securities Limited (Bermuda)
Professional Data Management, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Rastin Investing Corp. (Leucadia subsidiary, sister co. of Colonial Penn)
Recco Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Shigley, Kenneth L., Former Attorney for Appellant
Horeline Mutual management (Bermuda) Limited (Bermuda)
Silver Mountain Industries, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Slautterback, Richard D., Appellant
Slautterback, Sandra L. Appellant
Solan Corp. (Leucadia subsidiary, sister co. of Colonial Penn)
Sperry & Hutchinson Co., Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Strickland, Thomas, Former Attorney for Appellant
Telluride Properties Acquisition, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)
Terreacor II (Leucadia subsidiary, sister co. of Colonial Penn)
TLIC Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn) Transatlanta Truck Insurance Underwriters, Inc.
Transport Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Transportation Capital Corp. (Leucadia subsidiary, sister co. of Colonial Penn)
Turck Office of America
Truck Underwriters of America, Inc.
United General Life Insurance Co. (Conseco subsidiary, sister co. of Colonial penn)
Village of Inlet Beach, Inc. (Leucadia subsidiary, sister co. of Colonial Penn)

Vulcan Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Wabash Life Insurance Co. (Conseco subsidiary, sister co. of Colonial Penn)
Weaver, Cynthia G., Attorney for Appellant
Wedgewood Investments, L.L.C. (Leucadia subsidiary, sister co. of Colonial Penn)
Wells & Company, Inc. (Conseco subsidiary, sister co. of Colonial Penn)
Wellsco, Inc. (Conseco Subsidiary, sister co. of Colonial Penn)
WMAC Investment Corp. (Leucadia subsidiary, sister co. of Colonial Penn)
WMAC Credit Insurance Corp. (Leucadia subsidiary, sister co. of Colonial Penn)

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintian uniformity of decisions in the Court:

1

White vs. Mercury Marine, 11th Circuit Case No. 96-2931, decided December 1, 1997, which holds that a cause of action "accrues" when the Plaintiff knew or should have known of the injury *and its cause*".

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance,

1.

Whether the statute of limitations is tolled by the active fraud concealing a breach of fiduciary duty of

(a) A company to its sharehold; and/or

(b) A self insurance administration (IPC) to the self insurance company (AOO)

2.

Whether litigation concerning tripartite alternative risk insurance management and offshore "rent a captive" insurance schemes must be considered as a whole rather than through each individual contract.

Cynthia G. Weaver
Attorney of Record for Appellant
GA State Bar No. 743129

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P. O. Box 963
Elberton, GA 30635
Tel: (706) 213-1990
Fax: (706) 213-1977

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STATEMENT OF ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1.

The affirmance of the District Court's decision holds that the mere suspicion of fraud begins the statute of limitations period, and that the affirmative steps of the Defendant's conceal the actual fraudulent acts do not toll the running of the statute of limitations. This is opposite to an inconsistent with the December 1, 1997 115h Circuit decision of *White v. Mercury Marine*, Case No. 96-2931 (Anderson, Dubina and Carnes) which settled the law in this issue and held that for statute of limitations purposes, a cause of action "accrues" when the Plaintiff "knew or should have known of his injury *and its cause"*. (emphasis supplied).

Litigation concerning multimillion dollar alternate risk insurance management schemes utilizing offshore "rent a captive" companies which are created by three interlocking contracts must be conducted through consideration of all three contracts, in order to adequately resolve the issues.

COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW

AOO filed this action in the Northern District of Georgia on December 22, 1994. following discovery, IPC filed various motions, including a motion for summary judgment. The District Court granted summary judgment in favor of IPC on December 13, 1996 on the grounds that the claims were barred by statutes of limitations. An appeal was taken to the 11th Circuit, which affirmed the District Court *per curiam* on December 1, 1997.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

In 1985, the Appellant Companies, (AOO), Mutual Indemnity and Colonial Penn, entered into a tripartitie, "Rent-a-captive" alternate insurance risk management plan through three contracts: (1) The shareholder agreement between AOO and Mutual Indemnity dated August 1, 1985 (R. 70, Ex. 3) which is the subject of this suit, a Quota Share treaty (or reinsurance agreement) between Colonial Penn and Mutual Indemnity (R. 70, Ex. 4), and an Agent Agreement between AOO and Colonial Penn (R.70, Ex. 6).

1. *Shareholder Agreement* Pursuant to the Shareholder Agreement, AOO purchased 432,000 non-voting preferred shares of Mutual Indemnity. Mutual was then required to re-purchase these shares from AOO on 1-1-91 for an amount determined in the agreement. (R. 70, Ex. 3, p.1). In the interim, each year after the AOO share purchase, Mutual Indemnity was to declare a dividend on those shares pursuant to a formula contained in the Agreement, which further provided that the shares "shall not be sold, transferred, hypothecated, pledged or otherwise assigned or encumbered" (R. 70, Ex. 3, p.5).

Mutual Indemnity continued to send AOO financial statements regarding "your preferred shares Series V4" in 1986, 1987 and 1988, showing investment income and stock value. (R. 70, Ex. 8, Bates Stamp Numbers 1516-1549) On January 1, 1991, Mutual Indemnity failed to fulfill the scheduled stock redemption without explanation which prompted AOO to write the Bermuda Monetary Authority was the first notice to AOO that Mutual Indemnity had unilaterallly and illegally redeemed AOO's stock in 1986. (Report of Bermuda Monetary Authority, R. 70, Ex. 10). Suit

was then filed on this contract on December 22, 1994.

2. *Prior Litigation Concerning the Agent Agreement* Colonial Penn sued AOO alleging violations of the Agency Agreement on March 31, 1987 in U.S. District Court styled *Colonial Penn v. Slautterback, et al* U.S.D.C. No. Ga Case No. 87-CV-610, 36 F.3d 95 (11th Circuit 1994 per curiam). AOO sought to add Mutual Indemnity as a party to the Colonial Penn lawsuit, which was objected to by Colonial Penn. The District Court denied the Motion for joinder on July 20, 1987, and in its final judgment and Order of September 28, 1995, the Court stated that "since MI is not a party to this litigation, this decision does not puport to affect any rights AOO may have against MI." (Supplemental report of the Special master, R. 63, D. Ex. 13, p.38).

3. *Quota Share Treaty - Reinsurance Agreement* The third part of the scheme is the quota share treaty or the reinsurance agreement between Colonial Penn and Mutual Indemnity. After the insurance premiums were collected by AOO from the policyholder, they were then sent to Colonial Penn under the agency agreement, and the premiums, less Colonial Penn's fee, were then sent to Mutual Indemnity by Colonial Penn pursuant to the reinsurance agreement. Under the Shareholder Agreement, Mutual Indemnity would then return to AOO funds from the premiums needed to pay any claims that arose. If the premiums funds were not used, Mutual Indemnity was obligated to invest the premiums, returning to AOO any premiums remaining, less claims paid and Mutual Indemnity's fee, in December of each year. (District Court Order, R. 84).

In December 1987, Mutual Indemnity and Colonial Penn entered into a secret rescission of the quota share/reinsurance agreement which provided in part that

Colonial Penn would indemnify, defend and hold harmless Mutual Indemnity from any liability to AOO. (R. 70, Ex. 11) that agreement was concealed from AOO until March 1989, when it was finally produced in discovery in the litigation between AOO and Colonial Penn. (Affidavit of Richard D. Slautterback, R. 70, para.9)

ARGUMENT AND CITATION OF AUTHORITY

1. *The Mere Suspicion Of Fraud Does Not Constitute "Knowledge" Of Both The Injury And Its Cause" For Statute Of Limitations Purposes.*

The District Court found that the breach of contract occurred in December 1987 with the execution of the rescission agreement between Colonial Penn and Mutual Indemnity. (R. 82, p.18) Although AOO suspected that there was "something bad wrong" in 1986, it had not been able to discover any tangible evidence of what fraudulent acts had been committed until March of 1989, when the secret rescission agreement was produced during discovery, (R. 82, p. 27)

In Georgia, allegations of fraud must be "stated with particularity", O.C.G.A. § 9-11-9(b). Thus, unless AOO could have stated in its complaint the "circumstances constituting fraud with specificity", the suit would have dismissed, *McLean v. Haden* 214 Ga. App. 413, 448 S.E.2d 69 (1994). The District Court also found that Mutual Indemnity concealed the existence of the rescission agreement from AOO until March 1989. Thus due to Mutual Indemnity's fraud, the statute of limitations could not have begun to run until that date, and the suit was timely filed. O.C.G.A. § 9-3-96. A similar situation occurred in *Fircit Company II v. Hardin*, 225 Ga. App. 232, 483 S.E.2d 609 (1997), where the court considered a claim for damages and

fraud in real estate partnerships. The Georgia Court held that genuine issues of material fact remained as to when the fraud was discovered and whether the defendant's alleged misrepresentation and concealment of the full extent of the fraud prevented the Plaintiff from discovering rescission, the redemption of the shares and including the furnishing of false financial statements, are fraudulent in themselves, and thus must toll the statute. *Adler v. Hertling* 215 Ga. App. 769, 451 S.E.2d 91 (1994).

The requirement of having concrete facts to point to the cause of an injury before starting the limitations bar from running was pointed out by this Court in *White vs. Mercury Marine*, 11th Circuit Case No. 95-2931, decided December 1, 1997. In *White*, the Court was interpreting the general maritime statute of limitation and whether the "continuing tort", "modified continuing tort", or "discovery" theory should be applied to determine when the cause of action "accrued". After analyzing each of the competing theories and law from other circuits as well as this one, this Court held that the cause of action acrues "when the Plaintiff knew or should have known of his injury *and its cause*". (emphasis supplied) The plaintiff in that case was found to have waited too long to file suit after knowing of his injury (hearing loss) and its cause (engine noise), but not filing suit until the damages increased.

The evidence in our case shows that although AOO suspected fraud, Mutual Indemnity took significant steps to prevent AOO from discovering the facts to support the claim, until they were finally disclosed in March 1989. Thus, the statute of limitations had not yet run on AOO's causes of action when it filed suit in December 1994.

2. *The Three Parties To the Tripartie Agreement Necessarily Held A Confidential/Fiduciary Relationship To Each Other*

As the Trial Court correctly found, the facts of the arrangement are simple: AOO (Principal) rented the use of Colonial Penn's name, then sold insurance policies to individual policy holders, managed the claims, and sent the premiums to Colonial Penn Name), which deducted its fee, then forwarded the remaining premiums to Mutual Indemnity (Captive), which kept its fee, reinvested the rest of the premiums, and would return the invested premiums (less any claims payments) to AOO at the end of the agreement (R.82 p.2-3). As security for the money being held for AOO by Mutual Indemnity, AOO purchased 432,000 shares of Mutual Indemnity, which would be redeemed at the settling up period in January 1991. (R. 82 p.2-3).

A similar relationship existed in *Lehman v. Zuckerman*, 198 Ga App. 202, 400 S.E.2d 704 (1990), where Builder and Investor formed Construction Company for the purpose of building houses. Investor put his own money into the Company which Builder managed. When the Company was dissolved, Builder agreed in writing to repay Investor for his financial contributions. When Builder did not pay, Investor sued. Builder claimed at trial that Investor's claims for reimbursement and the procuring of agreement were fraudulent. The Georgia Court of Appeals held that "a special relation of trust or confidence exists between partners, who owe a duty 'utmost good faith' to each other. [Cit.] Because of that confidential relationship, one partner is entitled to rely on representations made by another partner. [Cit.] *Allen v. Sanders*, 176 Ga. App. 647, 649 (1) (337 S.E.2d 428)(1985). In the instant case, there is sufficient evidence of the existence of a confidential relationship: Zuckerman and appellant were equal partners in the construction company, each providing his own expertise

toward a common business objective. See *Vitner v. Funk* 182 Ga. App. 39 92) (354 S. E.2d 666) (1987)" *Lehman*, 198 Ga. App. at 431.

In our facts, AOO acted as the Investor - its funds (premiums) were sent to Colonial Penn, the Builder, who deposited them into Mutual Indemnity, the Construction Company. All three entities provided their own expertise towards the common business objective of making money from insurance policies. This establishes the fiduciary/confidential relationships as they related to the joint venture itself. Once a confidential relationship is established, the statute of limitations again is tolled. *Gilmore v. Bell*, 223 Ga. App. 513, 478 S.E.2d 609 (1996).

3. *A Confidential Relationship Exists Between A Stockholder And The Company In Which The Stock Is Held.*

With respect to the additional AOO - Mutual Indemnity relationship of stockholder and company, a second confidential relationship arises. Mutual Indemnity held AOO's money, with the duty to invest and eventually return it to AOO. AOO held shares of stock in Mutual Indemnity as "collateral" or security for the return of the money. When the final transaction dated of January 1, 1991 came and went without the money being received, AOO wrote the Bermuda Monetary Fund, and discovered that in a secret transaction in 1987, Mutual Indemnity had not only given the money to Colonial Penn, but it had also voided AOO's collateral by redeeming the stock in 1986 (R. 70, Ex. 10).

By holding both money and apparently the physical shares of stock themselves, in Bermuda, Mutual Indemnity was in a position to exert an overwhelming influence over AOO's interests. Under O.C.G.A. § 23-2-58, "[a]ny relationship shall be deemed confidential, whether arising

from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." All that this law requires is the showing of a relationship in fact which justifies the reposing of confidence in one party by another. As provided by O.C.G.A. § 23-2-53: "Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." "[O.C.G.A. § 23-2-53] expressly goes beyond the strict fiduciary relations of the parties and states that the obligation to communicate may arise 'from the particular circumstances of the case.'" *Remediation Services, Inc. v. Georgia Pacific Corporation*, 209 Ga. App. 427, 433 S.E.2d 631 (1993)

Thus, by entering into the secret rescission, escrow and indemnification, and hold harmless agreement with Colonial Penn and by redeeming AOO's stock without authority from AOO, (R 70, Ex. 10,11), Mutual Indemnity not only breached its duty of good faith, but also defrauded AOO by concealing this self dealing from AOO until it was discovered in 1991 (R 70, Ex. 11). This confidential relationship thus acts to toll the statute of limitations from beginning to run until 1991.

4. *The Three Contracts Which Comprise The Tripartie Agreement Must All Be Litigated Together.*

The alternative insurance risk market is a multi billion dollar business. This particular litigation involves a plan to provide trucking insurance coverage for motor carriers throughout the United States, involving an Atlanta-based

managing general agency (AOO), an insurer acting as a "name" or fronting company (Colonial Penn), and a Bermuda-based reinsurer acting as a fee-based "rent a captive" facility (Mutual Indemnity). The three contracts which bind each company to the others cannot stand alone, either with respect to the success of the joint venture itself or in determining the rights and duties of the parties.

In *Jenkins v. Jenkins Irrigation, Inc.*, 244 Ga. 95, 259 S.E.2d 47 (1979), the tri-party agreements between three individuals concerned the sale and purchase of stock in JI Inc., a covenant not to compete, and an indemnity agreement. Although JI, Inc. was not a party to any of the agreements, the Georgia Supreme Court held that it was a proper party to the lawsuit which later ensued. In so holding, the Court reasoned that "We cannot say that the covenant not to compete was not intended to protect [the other shareholder's] interests as well as those of the buyer and the corporation." *Jenkins,* supra 244 Ga. at 95. Thus, the corporation as well as all three individuals were proper parties to the lawsuit concerning one of the three contracts.

The insurance risk management "rent a captive" tripartie agreement is a vehicle for the flow of millions and billions of dollars in insurance premiums from policy holders in the United States into offshore bank accounts. The success of the "rent a captive" arrangement depends upon the operation and inter-relationships of the three contracts and parties themselves. Colonial Penn is not a named party to this lawsuit, and in the prior related litigation, it successfully blocked the addition of Mutual Indemnity as a party. *Slautterback v. Colonial Penn* 36 F3 95 (1994). In the instant case, Mutual Indemnity contends that the findings in the prior suit should be collateral estoppel in this litigation. These two positions, plus the existence of the secret rescisiion and indemnification agreement between Colonial Penn and

Mutual Indemnity clearly show the need for this Court to consider the entire arrangement in protecting the rights of the parties, and to set a precedent from which all future litigation if these matters can be conducted.

CONCLUSION

The District Court erred by determining that the statute of limitations begins to run when a party has the mere suspicion of the existence of fraud, as mere suspicion does not give rise to the "accrual" of a cause of action under *White v. Mercury Marine*, supra. The confidential relationships likewise toll the running of statutes of limitation and for both of these principal reasons, the appeal should be re-heard by the entire court.

Finally, with growing popularity of tripartie insurance risk management agreements, this Court needs to establish a precedent to direct the District Courts and parties as to how the tripartie agreements are to be considered and the litigation conducted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET No. 97-8050
DC Docket No. 94-03402-CV-JEC

RICHARD D. SLAUTTERBACK SANDRA L. SLAUTTERBACK, TRUSTEE, AMERICAN OWNER OPERATOR UNDERWRITERS, INC., and AMERICAN TRUCK UNDERWRITERS HOLDINGS CORPORATION,

Appellant,

vs.

IPC MUTUAL INDEMNITY, LIMITED,

Appellee.

CERTIFICATE OF SERVICE

This is to certify that I have served opposing counsel in the above-styled matter with a copy of the MOTION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC by depositing in the United States Mail a copy of the same, with adequate postage affixed thereon, addressed to the following:

Paul W. Burke, Esq.
Drew, Eckl & Farnham
P. O. Box 7600
Atlanta, GA 30057

This 19th day of December, 1997

_____
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APPENDIX I

CHAPTER 12. Captives

SECTION 12.1 INTRODUCTION

This chapter highlights the rules, regulations and laws applying to captives in most of the jurisdictions which concentrate on captive development. They are summaries only. The full text of the relevant laws, regulations, etc. appear in CAPTIVES by NILS Publishing Company, P.O.Box 2507 Chatsworth, CA 91311. Those interested in forming a captive should contact their attorney and an insurance consultant.

Thirteen categories of information are presented in each sheet. Each of these categories are discussed below.

SECTION 12.2 SUMMARY CATEGORIES

12.2.1. Definitions

This section explains terms with which the reader may not be familiar. For most jurisdictions, the types of captives are included under DEFINITIONS. To illustrate, Vermont's summary sheet defines "pure captive insurance companies," "industrial insured captive insurance companies" and " association captive insurance companies," The definitions assist the reader in deciding which type of captive they might want to form in a particular jurisdiction. If a person wanted to form a captive that was going to be a risk retention group in Vermont, an industrial insured captive insurance company would be the appropriate vehicle. The Definitions section provides this type of information.

The Definitions section sometime includes a definition of insurance coverages. Those definitions are

important for jurisdictions outside of the United States. For example, Bermuda permits captives to write "long-term business" and "general insurance business." The definitions for those terms are found in the Definitions section.

12.2.2. Special Taxes and Fees

This section explains what some of the initial and on-going regulatory costs are of owning a captive. The costs normally include: (1) application fees, (2) annual fees, (3) premium taxes, and (4) miscellaneous taxes. Where different taxes are charged for direct insurance and reinsurance, such differences are noted.

12.2.3 Average Time for Application Approval

No jurisdiction will guarantee how quickly it will review an application. A few jurisdictions do have time limits; if an application is not approved within the time limit, it is deemed approved. However, most jurisdictions can take as long as they need to review an application.

The time estimates provided in the summary sheets come from the jurisdictions themselves. A time estimate is the *average time* it takes to process an application. Since many jurisdictions want to have captives locate with them, the time to get a captive application approved is decreasing.

12.2.4. Required Application and/or Related Forms

This section provides a list of the form names and form numbers (if any) that must be filed to obtain a captive license. This section also lists the forms that management companies must file to be approved to operate in a jurisdiction.

Some jurisdictions provide all of their forms in a "kit" or "booklet." Where such a kit is available, the kit's name is listed at the bottom of this section.

12.2.5. Initial Filing Requirements

The INITIAL FILING REQUIREMENTS section explains what type of information must be filed with the application. The section also summarizes the procedures to follow when attempting to start a captive.

12.2.6. Coverage

The Coverage section lists the types of coverage that can be written by a captive.

A risk retention group can be a captive. In Chapter 9, Section 9.2.2.2, there is a discussion of the types of coverage that can be written by a risk retention group. That section should be studied. The coverages that are permitted under the Risk Retention Act can be written by almost any captive, but some of the coverage for a parent, but a risk retention group might not.

12.2.7. General Provisions

The information contained in the GENERAL PROVISIONS section of each summary sheet covers a broad range of material. There are serveral items that ususally are covered, including: (1) the approval of forms, (2) the filing of rates, (3) the need for a principal office in the jurisdiction, (4) the exclusion of captives from guaranty funds, and (5) the required frequency for board meetings.

12.2.8. Capital and Surplus

The minimum amounts of capital and surplus for the

differnt types of captives are found in this section. While the statutes of many jurisdictions stipulate what the minimums are, some jurisdictions require captives to maintain more than the minimums. The CAPITAL and SURPLUS section points out any differences between a statute's and a regulator's requirements.

12.2.9. Investment Restrictions

The types of investments that are acceptable to a jurisdiction are listed in this section. Most jurisdictions allow the use of "clean," irrevocable letters of credit to meet some or all of the capital and surplus requirements. The extent to which letters of credit can be utilized will be discussed in this section.

12.2.10. Reinsurance

The REINSURANCE section examines the types of reinsurance that a captive can write (this is also discussed in the COVERAGE section), and the types of reinsurance for which a captive can take credit on its financial statement. Reinsurance is one of the areas which is not well-defined in most statutes dealing with captives. Usually, the acceptability of reinsurance as an asset is left to the discretion of the regulator.

12.2.11. Renewal

The duration of a license and the information that must be filed to renew a license are discussed in the RENEWAL section. In most jurisdictions, a license can be renewed by paying the renewal fee and filing an audited financial statement.

12.2.12. Revocation or Suspension of License

The REVOCATION or SUSPENSION section lists the situations that could cause a regulatory authority to revoke or suspend a license. Any notice that a jurisdiction must provide before revoking or suspending a license also is described. It should be noted that some jurisdictions will revoke a license unless a captive starts to write coverage within a specified period of time (e.g., 2 years).

12.2.13. Contact

The CONTACT section indicates who to contact to start the licensing process. Most jurisdictions prefer that applicants meet with them before filing an application. Usually, the regulator will indicate after this meeting what the chances are for license approval. The meeting with the regulator often is the most important part of the application process.

SECTION 12.3 OVERVIEW OF CAPTIVE INSURANCE COMPANIES

The material in this section focuses on the formation of captive insurance companies *Chapter 9: Federal laws,* DISCUSSES RISK RETENTION GROUPS (RRGs), most of which are in fact captive insurance companies. The comments in this section apply to all captive insurers unless a distinction is made for RRGs.

12.3.1. Reasons for Forming a Captive

As discussed in *Chapter 4: Tax Implications,* a single-parent captive may not be permitted to fully deduct premiums as a business expense in the year the premiums are paid if the captive writes only bussness for the parent. Therefore, the following comments concerning captive formation apply to multiple-owner captives - which are

permitted to deduct their insurance premiums as business expenses. (For a detailed discussion of the Taxation of captives, see *Chapter 4: Tax Implication.)*

12.3.1.1. Cost Savings

Many organizations form captives to reduce the cost of their insurance premium. The savings accrue when the profit margin earned by an insurer is eliminated. Additionally, the investment income an insurer earned by investing premium dollars will now accrue for the benefit of the captive. Also, cost savings can be realized when a captive is able to operate with a lower expense ratio than an insurance company. (NOTE: There are periods during the underwriting cycle that insurers do not make a profit on the insurance coverage they write. The only profit, if any, accrues from the investment income. There are also intervals during the underwriting cycle that an insurance company may sell insurance coverage for less than a captive must charge for the same protection in order to remain solvent. Thus, the amount of money saved by using a captive insurer can vary significantly.)

12.3.1.2. Stability

Many organizations will form a captive simply to get off the underwriting "roller coaster." As mentioned above, there are periods when the premium for insurance coverage may actually be less than the insurer's cost. But, when insurers start to increase premiums, the increases can be hundreds of percent. By forming a captive the cost insurance can be stabilized by flattening the peaks and valleys where the cost of premiums vary wildly.

12.3.1.3. Control

A captive gives organizations the ability to control insurance operations in at least three areas where control is important. First, claims costs fostering be reduced. This occurs when a captive is more aggressive in its claims-handling practices.

Second, although insurers have developed many excellent risk management programs, it is financially unfeasible for them to develop such programs for every type of business client. These risk management programs, which go far in reducing costs, can be designed to concentrate specifically on the business of the organizations which are insured by the captive. A good risk management program can help reduce costs.

Finally, a captive permits an organization to control its insurance operations. Captive insurers can specialize in providing the services their parents need, e.g., in-dept data reports and legal and underwriting expertise.

12.3.1.4. Reinsurance

When an organization establishes a self-insurance program, it may encounter difficulty in obtaining excess coverage or reinsurance. By forming a captive, access to reinsurance markets may become available. Also, the personnel staffing the captive will be, in most cases, more knowledgeable about reinsurance than will persons in the parent organization.

12.3.1.5. Enhanced Flexibility

A captive can be structured to be less regulated than an insurance company. Such reduced regulation can provide some flexibility to the organization forming the captive -

particularly in the area of coverages, investments which satisfy equity requirements and rate filing requirements.

A captive insurer can provide more flexibility in premium payment patterns and in the timing of premiums payments (NOTE: Flexibility depends on who controls the captive if the captive is owned by a small number of organizations that only insure their own exposures, there will be more flexibility than if the insured does not own the captive. For RRGs, the owners of a captive *must* be the insureds.)

12.3.3. Management's Attitude

The rigers of following insurers up, down and through underwriting cycles, may lead management to conclude that a captive may be a desirable alternative to traditional insurance coverage. An important question must be asked of management, however. That question is: "Will the captive be viewed as a risk-handling mechanism, a profit center, or both?"

While it is more the exception than the rule, problems can arise when a captive's parent(s) views the captive as a profit center. Captive management can find itself pressured to produce a profit at the expense of adequate reserving. Management must be made aware of the importance of proper risk financing. The initial decision to form a captive insurance company almost always stems from the vagaries of insurance pricing and disruptive underwriting cycles, with the profit center motive secondary. Management must keep this in mind. In the long run, adequate reserving will produce the most stable profit picture.

12.3.3. Types of Captives

There are several ways to categorize captives: according to ownership, the needs of the insured, or by the type of coverage provided.

12.3.3.1. Ownership

Captives can be divided into four ownership categories. These are: single owner captives (pure captive), multiple-owner captives, rent-a-captives, and profit centers. Single and multiple-owner captives are what their names imply. A rent-a-captive is usually owned by entrepreneurs and operated as an income-producing business. Rent-a-captive operators form the captive and handle its operations, including claims payments. An organization insuring through a rent-a-captive first pays a premium and then may also be required to deposit securities or post a letter of credit to back up its business. The rent-a-captive then handles the insurance operation and purchases reinsurance for the business placed by the client. At the end of the accounting or policy period the insured is paid a dividend which depends on his or her losses. Rent-a-captives can also be structured so that there is a pooling of the results of all insureds.)

The profit center captive (PCC or "Insurance Profit Center") is slightly different. An organization wanting to be part of PCC (PCCs generally, but not always are comprised of a group) usually purchases non-voting preferred stock in the PCC. The funds paid the stock serve as equity to offset the premium that is placed with the PCC by the organization. The organization then places its coverage (or the PCC may do it depending on the services

it offers) through a fronting company. The fronting company reinsures the business with the PCC which may or may not enter into a retrocession of some of the business. The fronting company pays claims and handles must of the administrative details. When claims arise, it contacts the PCC for payment under the reinsurance treaty. (NOTE: The PCC can provide some or all of these services.)

At the end of the policy or accounting period, the PCC calculates the results of the business of the organization owning the non-voting preferred stock. If the reinsured coverage for that organization has been profitable, a dividend is paid on the stock. *Exhibit 12.1* contains a flow chart of a PCC. PCCs and rent-a-captives are similar, and often it is difficult to distinguish between the two types of operations. By eliminating the fronting company and by requiring a deposit, rent-a-captive functions much as a PCC.

Rent-a-captives and PCCs are used in dealing with the premium tax deductibility problem. As stated in *Chapter 4: Tax Implications,* premiums cannot be deducted unless there is a transfer of risk to the captive. Rent-a-captives and PCCs contend that they provide such a risk transfer mechanism.

12.3-3.2. Type of Insured

Captives can be categorized according to the type of insured. These categories include *related insureds* and *non-related insureds.*

Captives which provide coverage for related insureds only write coverage for their owners. This category includes single-parent and multiple-parent captives. Risk retention groups are a subset of related insured captives. Non-related insured captives may or may not write coverage for their

owners (although they normally do), but the most important distinguishing characteristic of the non-related insured captive is that they write coverage for *third parties.*

12.3.3.3. Type of Insurer

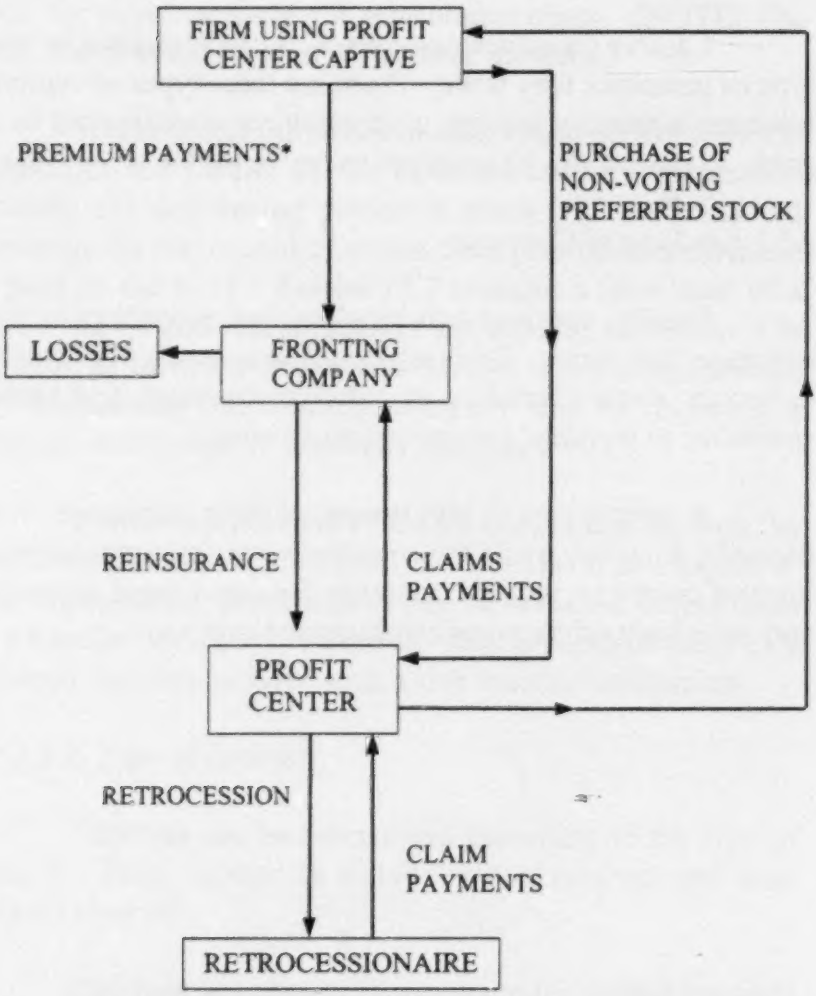
Captive insurance companies can be classified by the type of insurance they write. There are three types of captive insurers: a primary insurer, a reinsurer, or a participant in a pool. A captive can be involved in any or all the these areas.

12.3.3.4. Type of Coverage

Finally, captives can be classified according to the coverage they write. To illustrate some specialize in excess coverage, some specialize in liability coverage, and some specialize in workers' compensation coverage.

A captive may fit into several of these categories. For example, a captive could have multiple owners, write several lines of coverage, provide coverage for non-related insureds and write both primary and reinsurance business.

Chart 12 - 1
PROFIT CENTER (PC) CAPTIVE INSURANCE COMPANY FLOW CHART



* In some cases, a broker is used. When this occurs, the broker would review the premium payment and forward it to the fronting company.

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12.3.4. Fronting Companies

Fronting companies are not as popular as they were in the 1970s. At that time, the primary purpose of fronting companies was establishing a transfer of risk allowing premiums to be deducted as a business expense. If there was a transfer of risk, premiums would be tax deductible. The effectiveness of fronting companies as a transfer mechanism was eliminated by *Carnation* (see *Section 4.5: Placing Insurance with Subsidiaries or Captives* for a discussion of this and other decisions involving tax deduction of captive insurance premiums). As a result of Carnation, fronting companies generally cannot be used to prove a transfer of risk exists. However, there are reasons a captive might want to employ a fronting company.

Fronting companies are often approved by state insurance departments, whereas a captive insurer may be. For example, elevator contractors in New York are required to have liability coverage with a licensed insurer. If the contractor's captive is not licensed in New York, the coverage afforded by the captive would not be acceptable. This is a situation where a New York approved fronting company could be used to provide the coverage for the contractor's New York operations. The fronting company would then reinsure the coverage with the contractor's captive.

Fronting companies also can be useful to those captives not wanting to establish and maintain its own claims and general operation systems. Many fronting companies can provide a wide range of services, such as paying premiums, handling daily operations and providing related expertise.

The fronting company usually reinsures most of the

coverage placed by a captive's owners with the captive. If a captive wants to reduce its exposure or wants to grow slowly, this can be accomplished if the fronting company reinsures less than 100 percent of the coverage withheld captive. Any remaining balance of the risk can be retained by the fronting captive. Any remaining balance of the risk can be retained by the fronting company, or the fronting company can purchase reinsurance from another insurer. The captive also could reduce its risk by entering into a reprocessing.

12.3.5. Setting Up a Captive

The decision to establish a captive is merely the first of many choices facing the prospective captive owner(s). The following is a list of some of the further decisions that must be made. (see also the captive characteristics listed below in 12.3 .6).

1. Structure and type of ownership.
2. Amount of initial equity or investment,
3. Type of coverage to be sold,
4. Amount of coverage to be sold,
5. Amount of reinsurance to purchase,
6. Use of a fronting company,
7. Sale of coverage to third parties,
8. Premium deductibility,
9. Location of the captive, and

10. How services will be obtained*

These decisions are very interdependent. For example, the amount of coverage that can be written will be a function of the amount of equity, the amount of reinsurance that can be purchased and the limitations that may be imposed by the domicile of the captive. Thus, these decisions should not be viewed as independent decisions to be made but instead should be examined together withheld final disposition of each decision having impact on the next.

Several factors relating specifically to the captive's site of domicile must be reviewed by those in the organization who have decided to form the captive. The factors include;

1. Taxes and fees,

2. Transportation,

3. Communications,

4. Financial statement requirements,

5. Coverage limitations,

6. Office location requirements,

*If a captive decides not to use a fronting company, it must decide the functions it will perform. Will it hire in-house personnel to handle legal issues, to determine underwrting policy, to establish actuarial guidelines, to set up a risk management program, to handle claims, and to handle general operations; will it hire consultants to perform these functions; or will it use a combination of in-house and external personnel? The latter is usually the best approach. For example, if an organization is going to form a captive in another country, it should hire an attorney in that country to assist in the formation and operation of the captive. Some countries require that local attorneys, accountants, or consultants be hired.

7. Ownership requirements,

8. Average time to get a captive approved

9. Initial filing requirements

10. Investment restrictions

11. Capital and surplus requirements, and

12. Renewal requirements

Some of these factors require additional comment.

12.3.5.1. Taxes and Fees

Most jurisdictions which permit captives have an income tax and/or fee system.

Separate fees are normally charged for the various steps in forming a captive; i.e., there are fees for registering a company, for filing an application and for licensing an agent or insurance management company.